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Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NIPPON PAPER INDUSTRIES CO., LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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108 pp

QUESTIONS PRESENTED

(1) Whether this Court's decision in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), involving an application of the Sherman Act's civil provisions, dictates the unprecedented determination that Congress intended the Sherman Act to subject citizens of foreign countries to criminal sanctions for business conduct undertaken entirely outside the United States.

(2) Whether the First Circuit's decision, which held for the first time that the Sherman Act criminalizes business conduct undertaken solely by foreigners abroad, permits the imposition of criminal sanctions without adequate notice in violation of the Due Process Clause of the United States Constitution.

(3) Whether the First Circuit erred in applying *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), and *Ratzlaf v. United States*, 510 U.S. 135 (1994), to hold that a single phrase used in a statute with both civil and criminal applicability necessarily must be construed in criminal applications as it has been in an earlier civil application, even though the civil interpretation was determined without reference to the strict construction rules applicable to criminal statutes.

(4) Whether the court below, in applying *Hartford Fire* to a criminal case, effectively created federal criminal common law in violation of this Court's holdings in *United States v. Coolidge*, 14 U.S. 415 (1816), and *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).

PARTIES TO THE PROCEEDINGS

AND RULE 29.6 STATEMENT

The Petitioner, a Japanese company operating in Japan, is Nippon Paper Industries Co., Ltd. ("Nippon"). Petitioner was a defendant in the district court and an appellee in the Court of Appeals,[1] along with plaintiff-appellant, the United States of America.[2]

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[1] Jujo Paper Co., Ltd, was also indicted. In 1993, after the conduct alleged in the Indictment took place, Nippon was created when Jujo, a Japanese company, merged with another company and Jujo ceased to exist. Accordingly, Jujo has not appeared in this proceeding. The government has not alleged in the Indictment that Nippon is a successor-in-interest to Jujo under the laws of Japan. Hirinori Ichida, the other party named in the Indictment, has never appeared in this matter.

[2] Petitioner's statement listing all parent companies and nonwholly owned subsidiaries pursuant to Supreme Court Rule 29.6 is set forth in the Appendix at 62a-63a.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Nippon Paper Industries Co., Ltd.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, a Japanese company operating in Japan, hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 109 F.3d 1. Appendix (App.) 1a. The opinion and order of the district court are reported at 944 F. Supp. 55. App. 30a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1997. App. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Sherman Act, 15 U.S.C. § 1, *et. seq.* (1988), provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. Introduction and Summary

The three judges constituting the panel below agree with Petitioner regarding the significance of this case. The majority acknowledged that "[t]his case raises an important hitherto unanswered question." App. 3a. The concurring judge added:

> We are told that this is the first instance in which the executive branch has chosen to interpret the criminal provisions of the Sherman Act as reaching conduct

wholly committed outside of this country's borders. App. 21a.

These observations accurately depict both the novelty and the importance of the decision below.

In 1890, Congress passed the Sherman Act to promote a competitive economy in the United States unhampered by monopoly or unreasonable restraints on trade. In 1995 -- 105 years and thousands of prosecutions later -- the United States Government for the first time sought criminal penalties for an alleged conspiracy that occurred solely among foreign companies and entirely on foreign soil, even though similar allegations against foreigners abroad heretofore had been pursued only civilly, if at all.[3]

The court below reversed the district court's dismissal of the Indictment. Despite recognizing that the question in this case is "one of statutory construction," App. 5a, the court of appeals did not consider or interpret any part of the Sherman Act text. In fact, the closest it came to textual analysis was to find that the language on which the government principally relied (the Foreign Trade Antitrust Improvements Act of 1982) ("FTAIA"), 15 U.S.C. §6a (1994) did not support this extraterritorial prosecution. App. 8a. Instead, the court below

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[3] *See* Restatement (Third) of Foreign Relations Law § 403, Reporters Note 8 (1986) ("Restatement") ("No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States.").

simply held that *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), was controlling. Never mind that *Hartford Fire* was a civil case that did not consider the rules of strict construction uniquely applicable to criminal statutes, and never mind that the text of the Sherman Act does not contain anything close to the clear statement of congressional intent required to overcome the presumption against extraterritorial application of United States criminal laws. *See United States v. Bowman*, 260 U.S. 94, 98 (1922).

The decision of the court below has serious implications on at least three levels. First, it threatens important liberty interests by erroneously divining a congressional intent to criminalize wholly foreign conduct without any support in the statutory text and in the face of a widespread understanding at the time of the Sherman Act's enactment that penal provisions were presumed to apply only domestically. An interpretation so far removed from the text of the statute is tantamount to a federal court writing criminal common law, a power the federal courts clearly lack.

Second, the application of criminal penalties to conduct not previously subject to punishment contravenes due process, conflicts with international law, and strains relations with, and invites retaliation from, foreign states.

Third, the decision rides roughshod over the well-settled tradition of applying strict rules of construction to the criminal application of statutes with dual criminal and civil scope, regardless of any less rigorous, nontextual interpretations that have developed in civil cases. In this respect, the First Circuit's decision means that extant civil constructions of the scope of the Sherman Act hereafter

automatically control the meaning of the statute in criminal prosecutions and, going forward, that strict rules of criminal construction must consistently be applied in all civil proceedings raising heretofore unsettled issues under the Sherman Act. This contravenes longstanding rules of criminal construction designed to ensure fundamental fairness and to preserve separation of powers, and thus conflicts with this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422, 439-43 (1978). It also promises to eliminate the interpretive flexibility that has characterized 107 years of civil Sherman Act jurisprudence.

In short, this case presents the crucial question whether Sherman Act interpretations developed in civil cases in which "the courts have been invested with a jurisdiction to create and develop an 'antitrust law' in the manner of common law courts," I Phillip E. Areeda & Donald F. Turner, *Antitrust Law*, ¶ 106, at 15 (1978), can *ipso facto* be applied in the criminal context without violating the rules applicable to the interpretation of federal criminal statutes and to federal criminal prosecutions. The importance of the issues and the explosive implications of the First Circuit decision for relations with foreign states counsel immediate review by this Court.

B. Factual Background

On December 13, 1995, two Japanese companies operating in Japan -- Jujo Paper Co., Ltd. ("Jujo"), and Nippon Paper Industries Co., Ltd. ("Nippon") -- were indicted for allegedly conspiring to fix prices for thermal fax paper ultimately slated for sale in North America in violation of Section One of the Sherman Act. App. 50a. The Indictment

alleges that in 1990 Jujo sold fax paper in Japan to independent Japanese trading houses. These trading companies, which were not controlled by Jujo, took title to the product in Japan and thereafter shipped it to the United States through their own United States subsidiaries. App. 54a. The Indictment alleges, *inter alia*, that Jujo, along with unnamed co-conspirators, agreed in meetings in Japan in February and March 1990 to increase prices for fax paper in Japan that thereafter was to be sold by independent trading companies in North America. App. 53a.[4] Although the Indictment alleged that the independent trading houses were "co-conspirators," the United States Government conceded that there was no evidence that any of them (or their United States subsidiaries) were involved in these meetings. App. 44a-45a. Accordingly, the district court held that the Indictment did not sufficiently allege a conspiracy that involved the trading companies and did not allege any conspiratorial conduct by the Petitioner or alleged co-conspirators in the United States. App. 43a-45a. The court of appeals did not disturb this aspect of the district court's decision. Thus, as presented to this Court, the government's prosecution involves an alleged conspiracy by Japanese companies to raise prices on sales to other Japanese companies in Japan for products resold here by companies completely independent of the alleged conspirators.

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[4] The Indictment does not distinguish between Jujo and Nippon. This allegation is obviously inapplicable to Nippon, inasmuch as it did not exist until 1993. *See supra* n.1.

C. Proceedings Below.

1. On April 23, 1996, Nippon moved to dismiss the Indictment because it failed to allege a criminal violation of Section One of the Sherman Act since the alleged criminal conduct occurred entirely in Japan and solely involved Japanese companies.[5] That motion was granted.

Noting that the case involved "a question of first impression," App. 45a, the district court held that the Sherman Act did not apply to the alleged horizontal agreement between the Japanese manufacturers of fax paper. In so holding, the court rejected the government's claim that *Hartford Fire*, 509 U.S. 764, which involved a civil conspiracy by foreign companies abroad, was dispositive of the case, and noted that under *Bowman*, 260 U.S. at 97-98, the strong presumption against the extraterritorial application of federal statutes "carrie[d] even more weight when applied to criminal statutes." App. 46a. Drawing on the Restatement, § 403, cmt. f., the court added that without an affirmative expression of congressional intent, "'the presence of substantial foreign elements will ordinarily weigh against

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[5] In a portion of the case not relevant to this petition, the court rejected Petitioner's motion to dismiss on the ground that the court lacked general or specific personal jurisdiction, *see* App. 40a-41a, and agreed with Petitioner that the government failed adequately to plead a vertical price-fixing arrangement. Neither issue is now before the Court.

application of criminal law'" in statutes with criminal and civil enforcement provisions. App. 41a.

The district court also relied on *Gypsum*, 438 U.S. 422, in which this Court held that the flexible liability standards applied in civil Sherman Act cases could not be extended to criminal cases. The court concluded that the long-recognized distinctions between the criminal and civil provisions of the Sherman Act had to be respected because Congress at the time of enactment fully understood such distinctions and "did not intend to do away with them." App. 41a (quoting *Gypsum*, 438 U.S. at 443 n.19).

The court found support for its conclusion in the policies underlying antitrust and criminal law. On the civil side, "antitrust enforcement benefits from a certain degree of interpretive flexibility," App. 48a, while "such flexibility is antithetical to the principles of predictability and fairness that undergird the criminal law." App. 48a. In the face of congressional silence on the Sherman Act's reach, the court held that it would raise "serious questions about notice to foreign corporate defendants" to permit prosecution and the imposition of criminal sanctions. App. 48a. Indeed, the court stated, "the legislative history belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct." App. 48a.

2. The court of appeals reversed. It acknowledged that it was on "largely unchartered terrain" and that there is "no authority directly on point," App. 9a, but noted that the earliest case in this Court concerning the extraterritorial reach of the Sherman Act was a civil case holding that the "the presumption against extraterritoriality had not been

overcome." App. 6a (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Yet, the court said, 36 years later "a different court saw a very similar problem in a somewhat softer light," and held that the presumption against extraterritoriality in a civil case had been overcome where the conduct "was intended to affect imports [to the United States] and did affect them." App. 6a (citing *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*")). The court below concluded that any perceived "tension" between these two cases was "eased" by *Hartford Fire*, in which this Court "endorsed *Alcoa's* core holding." App. 7a.[6]

The court did not point to any text in the Sherman Act that manifested the requisite clear statement of congressional intent to apply the Act extraterritorially but was driven by the observation that the "same language in the same section of the same statute" provided the foundation for both civil and criminal enforcement. App. 9a. According to the court, this required the language to bear the same interpretation "regardless of whether the impetus for interpretation is criminal or civil." App. 9a. In support of this view, the court cited *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), *Ratzlaf v. United States*, 510 U.S. 135 (1994), "common sense," and general principles of statutory

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[6] The court below rejected the government's claim that the FTAIA manifested Congress' intent to apply the Sherman Act extraterritorially. The court noted that "[t]he FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it." App. 8a.

interpretation. App. 9a-10a. On this reasoning, the court held that *Hartford Fire* was dispositive.

The court then rejected five arguments proffered by Nippon. First, the court discounted the claim that this case was unprecedented and cited what it said was "solid authority" for the extraterritorial application of criminal statutes in other contexts. App. 13a.[7] Second, it found that *Bowman* did not establish a heightened presumption against extraterritoriality in criminal cases but, like the Restatement, merely recited the general presumption. App. 13a-14a. Third, the court held that *Gypsum* did not establish a distinction between criminal and civil applications of the Sherman Act because the Court there recognized that the civil and criminal evidentiary standards were the same with respect to *per se* violations of the Sherman Act and do not require a

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[7] Neither of the two cases cited by the court provides any, much less "solid," authority for its decision. In *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), the court held that the drug conspiracy statute applied extraterritorially only because the underlying substantive statute "specifically states that it is intended to reach prohibited acts committed outside the territorial jurisdiction of the United States." The Ninth Circuit reiterated courts' "reluct[ance] to give extraterritorial effect to penal statutes" in the absence of explicit congressional intent. *United States v. Hayes*, 653 F.2d 8, 11 (1st Cir. 1981) merely held that United States citizens on a United States registered vessel could be prosecuted for attempted importation of drugs into the United States and possession with intent to distribute when they were apprehended outside United States territorial waters. The Coast Guard had explicit authority to board United States vessels in international waters pursuant to 14 U.S.C. § 89(a).

showing of specific criminal intent. App. 14a-15a. In addition, the court observed that there was no similar tradition of distinguishing between civil and criminal enforcement in determining the territorial scope of a statute. App. 15a. Fourth, the court declined to apply the rule of lenity because *Hartford Fire* was deemed to have clarified any statutory ambiguity that otherwise might have been present. App. 16a-17a. Finally, the court of appeals held that international comity did not require dismissal of the Indictment because, according to the court, the alleged conduct was actionable both in Japan and the United States. App. 17a-18a.[8]

REASONS FOR GRANTING THE PETITION

Admittedly exploring "uncharted terrain," App. 43a, the First Circuit sustained the government's bid to bring an unprecedented criminal prosecution on the basis of wholly foreign conduct carried out solely by foreigners. Though such a prosecution has never before been permitted (or even attempted) in the Sherman Act's 107-year history, the court of appeals nevertheless held *Hartford Fire's* construction of the Sherman Act in a civil setting controlling in determining the Act's criminal scope. As reflected by the very opposite views taken by the district and appellate courts below,

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[8] Judge Lynch concurred, focusing largely on whether the exercise of jurisdiction was consistent with international law. Judge Lynch noted that the court's task "is not the usual one of determining congressional intent," App. 20a, because "the federal courts have been invested 'with a jurisdiction to create and develop an "antitrust law" in the manner of the common law courts.'" App. 20a.

automatic application of *Hartford Fire* in a criminal proceeding targeting overseas conduct raises serious questions implicating the weight and interpretation of this Court's precedents. Such precedents include the rule of *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), requiring a clear statement of congressional intent before any civil or criminal statute may be applied extraterritorially, the sharp distinction between the Sherman Act's civil and criminal provisions recognized in *Gypsum,* and established international, common law and statutory principles that recognize significant differences in the way civil and penal laws are to be interpreted.

The importance of the First Circuit's dramatic expansion of the Sherman Act cannot be overstated. The decision jeopardizes important liberty interests (potential incarceration and criminal fines that in some cases have totalled $100 million) and does so without adequate notice in violation of the Due Process Clause. The court of appeals' decision extends the Sherman Act much further than the 1890 Congress intended and thus undermines separation of powers and creates what is tantamount to a federal criminal common law. It also strains relations with foreign states, and invites retaliatory action against United States companies. A decision of such import should not pass unreviewed.

The issues presented here will undoubtedly recur. The Justice Department has at least 20 grand jury investigations pending involving foreign nationals and foreign conduct. Justice Department officials have acknowledged that prosecution of international cartels is one of the Antitrust Division's top priorities and that it expects to prosecute other

foreign individuals and companies under the Sherman Act for wholly foreign conduct.[9]

That the First Circuit's opinion represents the first occasion on which any federal court has sanctioned a highly intrusive criminal prosecution of wholly foreign conduct under the Sherman Act provides no reason for postponing this Court's review. The legal question presented is clearcut and is unlikely to be enlightened by additional appellate treatment. Moreover, the First Circuit's analytical approach -- under which all prior expansive civil constructions of the Sherman Act must govern in criminal prosecutions, and under which all future civil interpretations of the statute in unsettled areas presumably must be governed by the strict rules of construction applicable to penal provisions -- conflicts with the analytical approach practiced by nearly every court in the land.

I. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW CONCERNING WHETHER AN EXPANSIVE INTERPRETATION OF A REMEDIAL STATUTE IN A CIVIL PROCEEDING OVERRIDES SETTLED RULES OF CONSTRUCTION WHEN THE SAME STATUTE IS APPLIED CRIMINALLY.

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[9] Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Advanced Criminal Antitrust Workshop, Criminal Enforcement in a Globalized Economy 3 (Feb. 20, 1997); Gary R. Spratling, Advanced Criminal Antitrust Workshop, Criminal Antitrust Enforcement Against International Cartels 1, 3 (Feb. 21, 1997). The government can get no benefit from its pronouncements on these issues, however, inasmuch as the Justice Department has no rulemaking authority.

A. The First Circuit's Decision To Apply An Expansive Interpretation Of The Sherman Act's Civil Scope In A Criminal Prosecution Is Manifestly Contrary To Congressional Intent At The Time Of The Statute's Enactment.

It is well-settled that a statute must be interpreted in the context in which it was enacted. See, *e.g.*, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 71 (1992); *Ngiraingas v. Sanchez*, 495 U.S. 182, 189-92 (1990). Section One of the Sherman Act, enacted in 1890, has retained its original form. *See* I Earl W. Kintner, *The Legislative History of the Federal Antitrust Laws & Related Statutes* 7 (1978). Accordingly, the Sherman Act must be -- and has consistently been -- interpreted against the backdrop of the rules of statutory construction in force in 1890. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 & n.11 (1978) (interpreting Section One based on common-law precedents); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495-96 (1940) (Section One must be given meaning it had at common law); Kintner, *supra*, at 7-10 (Sherman Act was intended to apply existing common law principles to trusts and other businesses.).

The First Circuit's decision ignores two principles that were well settled in 1890 and that are particularly illuminating on the issue of congressional intent regarding extraterritorial application of the Sherman Act in criminal cases. *First*, criminal statutes were understood not to apply extraterritorially unless Congress expressly so provided. *Second*, criminal statutes were to be construed more narrowly than were civil statutes -- even to the point of construing the

same language in the same statute differently depending upon whether criminal or civil remedies were sought. These principles, particularly when viewed together, compel the conclusion that the civil legacy of *Alcoa* and *Hartford Fire* cannot *ipso facto* control the question whether the Sherman Act permits the federal government to prosecute business practices carried out by citizens of foreign countries entirely on foreign soil.

Penal statutes in 1890 were confined in their reach to the territorial boundaries of the United States. *See* Platt Potter, *A General Treatise on Statutes: Their Rules of Construction, and the Proper Boundaries of Legislation and of Judicial Interpretations* 246 n.35 (1873) ("[p]enal statutes are . . . local in their character, and there can be no recovery under them for offenses, committed beyond the territorial jurisdiction of the state."); Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1225 (1991) (the extraterritoriality doctrine at the turn of the century relied on the territorialist theory, under which "a sovereign's power was limited to activities occurring within its territory."); 1 Sir Robert Phillimore, D.C.L., *Commentaries Upon International Law* 456 (3d ed. 1879) ("In the United States . . . , the rule of confining penal justice to the territory in which the offence has been committed has been most rigidly adhered to."). Moreover, in the few instances where Congress intended to have even civil laws applied extraterritorially, it stated that intention in express statutory language. *See, e.g.,* Guano Islands Act of 1856, codified at 48 U.S.C. § 1417 (1994) (extending reach of United States laws "over such islands, rocks, and keys.").

While jurisprudence under the Sherman Act has evolved to the point where courts have applied its civil provisions to overseas conduct, no court has ever found (or purported to find) language in the Sherman Act that qualifies as an express statement of congressional intent to apply the Act to conduct occurring entirely abroad. Neither the Second Circuit in *Alcoa* nor this Court in *Hartford Fire* did so. True, as the First Circuit observed, the statute does contain language extending its reach to commerce "with foreign nations," but boilerplate language of that nature has never been held sufficient to establish an intention to subject foreign conduct to United States statutes, even where the actors are citizens of this country. *See Aramco*, 499 U.S. at 249-52. When the Sherman Act's silence on the point is coupled with the well-understood presumption at the time of its enactment that penal statutes had domestic application only, it is plain that Congress did not intend the expansive extraterritorial scope divined by the court of appeals. In fact, as the district court recognized, the statute's legislative history confirms that the criminal penalties in the Sherman Act were to have no extraterritorial effect. *See* App. 48a-49a (citing statement by Senator Sherman).

In confusing the interpretive rules for civil and criminal statutes, the court of appeals also overlooked principles of international law that make clear that a criminal statute is applied extraterritorially "more sparingly than civil jurisdiction over the same activity." Restatement, § 403, Reporters' Note 8. This is because the extraterritorial application of criminal statutes is "particularly intrusive" on the sovereignty of other nations. *Id.* Indeed, the Restatement singles out the United States antitrust laws for application of

this principle, and makes clear that while civil application of United States antitrust laws might be consistent with international law, criminal application of the same laws is not. *Id.* § 403, cmt. f. Thus, given the absence of statutory text confirming the extraterritorial reach of the Sherman Act's criminal provisions, *see id.*, principles of international law provide an additional basis for rejecting the First Circuit's approach. *See Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.) (an Act of Congress "ought never to be construed to violate the law nations" if any other construction is possible.).

The First Circuit reached its erroneous conclusion by placing dispositive weight on the fact that the same Sherman Act language defines the conduct subject to civil enforcement and to criminal prosecution. Hence the invocation of *Alcoa* and *Hartford Fire*. But it was not at all unusual at common law to apply different meanings to remedial and penal provisions under such circumstances. As one early commentator stated, "[t]here can be no question that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." Potter, *supra,* at 244. *See also id.* at 262 ("[t]here is no impropriety, it remains to be observed, in putting a strict construction on a penal clause, and a liberal construction on a remedial clause, in the same act of parliament.") In contrast, in order to safeguard the rights of criminal defendants to fair notice of the conduct that can result in a deprivation of liberty, "[p]enal statutes receive a strict interpretation. The general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted." *Id.* at 245 & n.35 (citing cases); *see*

also id. at 246 ("penal statutes are taken strictly and literally . . in the point of defining and setting down the *crime* and the *punishment* . . .) (emphasis included); Wm. L. Clark, Jr., *Handbook of Criminal Law* 28 & n.30 (1894) ("[t]he rule is that penal statutes are to be construed strictly against the state, and in favor of the accused."). Accordingly, in instances of doubt regarding the reach of a penal provision, "the party of whom the penalty is claimed, is entitled to the benefit of the doubt,"*id.* at 246 n.35, a presumption that had no civil analog.

Certainly, at the time Congress passed the Sherman Act, it was well understood in this country that civil provisions were given broad scope in order to effectuate their remedial purposes, while penal laws were interpreted strictly in order to safeguard the rights of criminal defendants and to preserve Congress' role in defining the range of conduct subject to criminal sanctions. *See, e.g., United States v. Hartwell*, 73 U.S. 385 (1868); *Gibbons v. People*, 33 Ill. 443 (Ill. 1864); *Steel v. State*, 26 Ind. 82 (Ind. 1866); *People v. Reynolds*, 71 Mich. 343, 38 N.W. 923 (Mich. 1888); *People v. Reilly*, 50 Mich. 384, 15 N.W. 520 (Mich. 1883); *State v. Lovell*, 23 Iowa 304 (Iowa 1867). In the words of Chief Justice Marshall in *United States v. Wiltberger*, 18 U.S. 76, 95 (1820):

> The rule that penal statutes are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the main principle that the power of punishment is vested in the legislative, not in the judicial,

> department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

By mechanically applying *Hartford Fire* outside of the civil context, by failing to construe the Sherman Act in light of the assumptions regarding extraterritoriality prevailing at the time of its enactment, and by failing to interpret the text of the Act pursuant to the rules of strict construction governing criminal (but not civil) statutes, the First Circuit reached the plainly erroneous conclusion that the Sherman Act was intended to permit the criminal prosecution of entirely foreign business practices.

B. The First Circuit's Decision Works An Unprecedented Judicial Enlargement Of A Criminal Statute In Violation Of Due Process.

In holding for the first time that the Sherman Act applies to criminal conduct abroad, the court of appeals not only misapplied settled rules of statutory construction but also ignored the long-standing principle that "a person receive fair notice . . . of the conduct that will subject him to punishment," *BMW of North America Inc. v. Gore*, 116 S. Ct. 1589, 1598 & n.22 (1996). The First Circuit's enlargement of the territorial scope of the Sherman Act's criminal provisions -- without any legitimate antecedent for that expansion -- jeopardizes the due process rights of Petitioner and future defendants.

Petitioner had no reason to believe that Congress intended such criminal penalties to apply to wholly foreign conduct. While *Alcoa* applied the civil provisions of the

Sherman Act to overseas conduct, it did not consider whether the statute exposed foreign actors to criminal sanctions for conduct undertaken wholly abroad. Since, at common law, penal statutes were interpreted strictly and were held to have no extraterritorial effect, Petitioner had no reason to believe that entirely foreign conduct would be subject to criminal penalties in the United States. The actions of the United States Government were confirmatory: Never before in the statute's history had the government ever sought to impose criminal penalties on foreign citizens for conduct occurring wholly abroad. *See* Restatement, § 403, Reporter's Note 8 (1986).[10]

Hartford Fire could not possibly have put Petitioner on reasonable notice that the kind of foreign conduct at issue here was actionable under the Sherman Act -- even civilly. For one thing, that decision was handed down three years *after* Petitioner's alleged conduct took place. For another, the case did not present wholly foreign conduct, in that the scheme in question was allegedly crafted and supervised by United States actors; the foreign defendents in *Hartford Fire* thus could be charged with the overt acts of their American co-conspirators. 509 U.S. at 769-70, 773. Moreover, the

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[10] The only two cases the government cited in support of its argument that this prosecution was not unprecedented in the application of the Sherman Act to wholly foreign conduct were *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957) and *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 313 (D.D.C. 1960). As the district court correctly recognized, both cases "specifically premise their holding on the fact co-conspirators committed overt acts in the United States." App. 45a.

foreign defendants in *Hartford Fire* conceded that the plaintiffs could assert a civil claim under the Sherman Act with respect to overseas conduct as long as that conduct had produced effects in the United States, thus relieving the Court of the burden of deciding the jurisdictional question. *Id.* at 795-96. Absent that concession and the *Alcoa* legacy, it is far from clear that the Court would have applied even the civil provisions of the Sherman Act to wholly foreign conduct. *See id.* at 814 (Scalia, J., dissenting) (raising the question "whether, and to what extent, Congress has exercised" its power to legislate with respect to wholly foreign commerce.).

While the Court in *Hartford Fire* may have felt bound in that case to follow *Alcoa,* no such binding force is warranted in a criminal matter, where the Due Process Clause requires a defendant to have adequate notice of the conduct that may result in punishment. As the Court stated in *United States v. Harriss*, 347 U.S. 612, 617 (1954):

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

See also Bouie v. City of Columbia, 378 U.S. 347, 358 (1964) (noting "the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ."). Even giving the government every conceivable benefit of the doubt, the Sherman Act is at best ambiguous

as to whether Congress intended the Act's criminal provisions to reach wholly foreign conduct. In the face of such statutory ambiguity, the rule of lenity requires that the interpretation most favorable to the defendant be selected in order to protect fundamental due process rights and to ensure that "legislatures and not courts . . . define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

As emphasized, *Alcoa* and *Hartford Fire*, given their civil moorings, were decided under much different rules. The rule of lenity was not applied in those cases; indeed, it was not even cited. By failing to apply the venerable rule of lenity to this question of first impression, and by failing to subject the criminal provisions of the Sherman Act to the rules of construction that Congress well understood at the time of its enactment, the First Circuit has commissioned an expansion of the scope of the Sherman Act's criminal prohibitions without prior notice, and in derogation of Congress' role in specifying punishable conduct.

Where, as here, a court makes an unforeseeable enlargement of the scope of a criminal statute, this Court has not hesitated to intervene. *See, e.g., Bouie*, 378 U.S. at 352 ("[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."); *Marks v. United States*, 430 U.S. 188, 191-97 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam). The Court has analogized such cases to legislation proscribed under the *Ex Post Facto* Clause, which prohibits retroactive criminalization of previously non-criminal

conduct. *See Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Bouie*, 378 U.S. at 353 ("an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law such as Art. I, § 10 of the Constitution forbids."). As emphasized in *Pierce v. United States*, 314 U.S. 306, 311 (1941), "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *See also Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

The First Circuit's sudden enlargement of the territorial scope of the Sherman Act requires this Court's immediate attention. The criminal provisions of the antitrust laws, no less than other criminal prohibitions, cannot be expanded by judicial decree.

II. THE DECISION BELOW THREATENS THE REMEDIAL PURPOSES OF THE SHERMAN ACT'S CIVIL ENFORCEMENT MACHINERY AND THUS CONFLICTS WITH *GYPSUM* AND THE DECISIONS OF VIRTUALLY ALL OTHER COURTS.

No matter how the First Circuit's opinion is interpreted, the decision promises to alter judicial application of the Sherman Act in fundamental ways. In the immediate future, the decision, if followed faithfully, requires courts mechanically to apply all extant constructions of the Sherman Act rendered in civil cases to criminal prosecutions. The long-term implications of the decision are even more

pernicious, for the First Circuit's determination that the Sherman Act's general language must be construed identically in civil and criminal applications dictates that all first-impression interpretations of the Act hereafter be governed by the strict-construction rules applicable to criminal prohibitions, even if the Act is being applied in a civil proceeding. This will scuttle the flexibility that has characterized judicial interpretation of the Sherman Act in civil applications, and has enabled the Act to fully keep pace with evolving markets and ever more sophisticated business practices.

It is axiomatic that in the construction and application of criminal prohibitions, with their obvious implication for important liberty interests, defendants are afforded procedural and substantive safeguards not provided to defendants in purely civil disputes.[11] At the same time, in order to fulfill the remedial purposes of civil statutes, there is a greater willingness to interpret such laws expansively and to impose less exacting evidentiary standards. *See Coffee*, 101 Yale L.J. at 1878 ("The concept of 'fair notice' is less of a normative

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[11] *See, e.g.*, John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models -- And What Can Be Done About It*, 101 Yale L.J. 1875, 1878 (1992). Important distinctions between criminal and civil law applications can be seen in numerous decisions of this Court. *See, e.g., In re Winship*, 397 U.S. 358 (1970) (holding that all elements of a criminal offense must be proven beyond a reasonable doubt); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (holding that the standard dispensing with a *mens rea* requirement in civil antitrust cases did not apply in criminal prosecutions under the Sherman Act).

barrier in the civil context, because courts are usually dealing with the allocation of losses between the parties."); *cf. Bouie* at 358 ("It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say he may be convicted and punished as a criminal."). Even the First Circuit acknowledged that this criminal-civil distinction has "centuries" of support in the "Anglo-American legal tradition." App. 15a.

The history of the Sherman Act makes it clear that the tradition of interpreting civil and criminal statutes according to fundamentally different rules cannot be ignored solely because the same substantive language defines the range of actionable conduct in both contexts. The Sherman Act contains "a generality and adaptability comparable to that found . . . in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Thus, the Sherman Act has been applied flexibly in civil cases to impose novel regulation on a multitude of business arrangements. Recently, for example, courts have considered such factors as market conditions and efficiency justifications to test complex business arrangements for unreasonable restraints of trade. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) (permitting claims of monopolization and unlawful tying to proceed with respect to intrabrand aftermarkets); *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 ("[r]ule of [r]eason . . . has been used to give the Act both flexibility and definition . . . . "). These and other cases

exemplify the difficulty of determining, *ex ante*, whether a business practice violates the Sherman Act.

Criminal decisions under the Sherman Act manifest no such remedial flexibility. In *Gypsum,* this Court rejected the argument that longstanding civil precedents automatically govern parallel criminal applications of the Sherman Act. 438 U.S. at 433-34. *Gypsum* involved a criminal prosecution of several material manufacturers for price-fixing. This Court refused to allow the intent element of the criminal prosecution to be governed by *United States v. Container Corp.*, 393 U.S. 333 (1969), a civil case under Section One of the Sherman Act, and held that *mens rea* was a necessary element of a criminal offense under the identical provision.

The civil-criminal distinction under the antitrust laws has guarded individual rights in criminal cases and allowed sweeping adaptability in civil cases to meet 107 years of changing business conditions and practices. The government has so acknowledged:

> Unlike most criminal statutes, the Sherman Act does not provide a precise checklist of conduct that may be met with a criminal prosecution -- all antitrust violations are potentially felonies. Yet, the Act has not been interpreted as if it were primarily a criminal statute. . . . It would offend the notion of fundamental fairness to bring the weight of the government's criminal enforcement powers to bear against conduct, the legality of which could be determined only after the fact.

60 Minutes with Charles F. Rule, Assistant Attorney General, Antitrust Division, 57 Antitrust L.J. 257, 268 (1988).

Indeed, until this case, the United States Government had consistently (and successfully) urged courts to construe the Sherman Act "expansively in its civil applications" while applying it narrowly in criminal cases. II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 311a at 33 (1995).[12] The government's strategy was wise -- the Act's "generality of purpose and function could never have been achieved had the courts interpreted and applied the Sherman Act in the manner of a criminal statute." II Phillip E. Areeda & Hovenkamp, § 3116 at 33 (1995); *Gypsum,* 438 U.S. at 443 n.19 (1978). The government should not now be permitted to tear down with one hand the antitrust regime it has built with its other.

Interpreting the civil provisions of the antitrust laws based on the heightened standards for criminal laws would also interfere with Congress' intent to give the federal courts "jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts." I Phillip E. Areeda & Donald F. Turner, *Antitrust Law*, ¶ 106, at 15 (1978). If the

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[12] Moreover, the government in *United States v. General Elec. Co.*, No. CR-2-94-019 (E.D. Ohio Oct. 3, 1994), argued that the standards of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), which involved civil litigation, did not control the jury instructions in a criminal case. Memorandum of the United States in Opposition to Motion of Defendant General Electric Company in Support of Its Supplemental Jury Instructions Concerning Inference at 3-4 n.4.

historical criminal-civil distinction under the Sherman Act is erased, courts will be forced to place new applications of the civil antitrust laws under the yoke of the strict interpretive rules reserved for criminal prohibitions. At the same time, courts will be compelled to sanction a broader reach for the Sherman Act's criminal prohibitions through the automatic application of extant civil precedents, thereby eroding important constitutional safeguards for criminal defendants -- and creating what is tantamount to federal criminal common law, a power denied to the federal courts. *See, e.g., United States v. Hudson and Goodwin*, 11 U.S. 32, 34 (1812) (for a federal court to have jurisdiction to try a criminal case, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction"); *see also United States v. Coolidge*, 14 U.S. 415 (1816) (to same effect). Each of these consequences of the First Circuit's analytical approach promises harm.[13]

This Court's decisions offer no support for the First Circuit's befuddled analysis. The court below relied on *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), and *Ratzlaf v. United States*, 510 U.S. 135 (1994). App. 10a. In *Thompson/Center*, the Court held that the narrow criminal interpretation required by the rule of lenity governed the interpretation of the scope of the statute even in the civil context. 504 U.S. at 517-18. *Thompson/Center* plainly cannot be cited for the reverse proposition that broad

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[13] It is doubtful that the government would agree that all conventions governing the interpretation of criminal laws, including the rule of lenity, should apply in civil antitrust cases.

civil interpretations must reflexively be applied to interpret the scope of criminal provisions that use the same words. The court's reliance on *Ratzlaf* is equally misplaced. There, this Court held that a single phrase found in multiple places in a criminal statute should be afforded the same meaning. 510 U.S. at 143. Like *Thompson/Center*, *Ratzlaf* has no bearing on the question whether an earlier broad and flexible civil interpretation dictates the later interpretation of those words in a criminal case. To hold that an earlier civil construction of a statute controls a subsequent criminal construction ignores the fundamental distinction between criminal and civil laws that this Court and lower courts have long recognized.[14]

At bottom, the First Circuit's erosion of the criminal-civil distinction not only produces an erroneous result in this case, but also confounds the interpretation of the Sherman Act, and other statutes with dual civil-criminal provisions, by casually discarding years of established precedent designed to preserve the flexibility and adaptability of such statutes in civil cases while safeguarding both the rights of defendants and separation of powers in criminal proceedings. So profound an alteration of the rules for interpreting and

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[14] The Court in *Gypsum* recognized the existence of important distinctions in the interpretation of the criminal and civil applications of the Sherman Act when it cited legislative history indicating that "[t]he first section, being a remedial statute, would be construed liberally with a view to promote its object. . . . and that [t]he third section is a criminal statute, which would be construed strictly and is difficult to be enforced." *Gypsum*, 438 U.S. at 443 n.19.

applying our nation's antitrust laws should not be permitted without this Court's prior review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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June 13, 1997

APPENDIX

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APPENDIX A

United States Court Of Appeals
For the First Circuit

No. 96-2001

UNITED STATES OF AMERICA,
Appellant,

v.

NIPPON PAPER INDUSTRIES CO., LTD., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Lynch, Circuit Judge.

Mark S. Popofsky, Attorney, Antitrust Division, U.S. Dep't of Justice, with whom Anne K. Bingaman, Assistant Attorney General, Joel I. Klein, Deputy Assistant Attorney General, John J. Powers, III, Robert B. Nicholson, David A. Blotner, Lisa M. Phelan, and Reginald K. Tom, Attorneys, Antitrust Division, were on brief, for the United States.

Richard G. Parker, with whom Geoffrey D. Oliver, Alan M. Cohen, O'Melveny & Myers LLP, William H. Kettlewell, and Dwyer & Collora were on brief, for Nippon Paper Industries Co., Ltd.

John G. Roberts, Jr., David G. Leitch, H. Christopher Bartolomucci, and Hogan & Hartson L.L.P. on brief for Government of Japan, amicus curiae.

March 17, 1997

SELYA, Circuit Judge. This case raises an important, hitherto unanswered question. In it, the United States attempts to convict a foreign corporation under the Sherman Act, a federal antitrust statute, alleging that price-fixing activities which took place entirely in Japan are prosecutable because they were intended to have, and did in fact have, substantial effects in this country. The district court, declaring that a criminal antitrust prosecution could not be based on wholly extraterritorial conduct, dismissed the indictment. See United States v. Nippon Paper Indus. Co., 944 F. Supp. 55 (D. Mass. 1996). We reverse.

I. JUST THE FAX

Since the district court granted the defendant's motion to dismiss for failure to state a prosecutable offense, we draw our account of the pertinent events from the well-pleaded facts in the indictment itself. See United States v. National Dairy Prods. Corp., 372 U.S. 29, 33 n.2 (1963).

In 1995, a federal grant jury handed up an indictment naming as a defendant Nippon Paper Industries Co., Ltd. (NPI), a Japanese manufacturer of facsimile paper.[1] The indictment alleges that in 1990 NPI and certain unnamed coconspirators held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax

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[1] The grand jury also named another Japanese manufacturer, Jujo Paper Co., Ltd. (Jujo), as a codefendant. Two years earlier, however, NPI had been formed and, the government alleges, had assumed Jujo's assets and liabilities. Because the issue of successor liability is not before us, we treat NPI as if it were the sole defendant and as if it, rather than Jujo, were alleged to have committed the acts described in the indictment.

paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices. The indictment further relates that, in 1990 alone, NPI sold thermal fax paper worth approximately $6,100,000 for eventual import into the United States; and that in order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those that it had arranged. These activities, the indictment posits, had a substantial adverse effect on commerce in the United States and unreasonably restrained trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1 (1994).

NPI moved to dismiss because, inter alia, if the conduct attributed to NPI occurred at all, it took place entirely in Japan, and, thus, the indictment failed to limn an offense under Section One of the Sherman Act. The government opposed this initiative on two grounds. First, it claimed that the law deserved a less grudging reading and that, properly read, Section One of the Sherman Act applied criminally to wholly foreign conduct as long as that conduct produced substantial and intended effects within the United States. Second, it claimed that the indictment, too, deserved a less grudging reading and that, properly read, the bill alleged a vertical conspiracy in restraint of trade that involved overt acts by certain coconspirators within the United States. Accepting a restrictive reading of both the statute and the

indictment, the district court dismissed the case. See United States v. NPI, 944 F. Supp. at 64-66. This appeal followed.

II. ANALYSIS

We begin - and end - with the overriding legal question.[2] Because this question is one of statutory construction, we review de novo the holding that Section One of the Sherman Act does not cover wholly extraterritorial conduct in the criminal context. See United States v. Gifford, 17 F.3d 462, 471-72 (1st Cir. 1994).

Our analysis proceeds in moieties. We first present the historical contact in which this important question arises. We move next to the specifics of the case.

A. An Historical Perspective.

Our law has long presumed that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (citation omitted). In this context, the Supreme Court has charged inquiring courts with determining whether Congress has clearly expressed an affirmative desire to apply

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[2] Inasmuch as we hold that activities committed abroad which have a substantial and intended effect within the United States may form the basis for a criminal prosecution under Section One of the Sherman Act, we need not address the government's alternative argument that the indictment in this case alleges that some overt acts in furtherance of the conspiracy were perpetrated in the United States.

particular laws to conduct that occurs beyond the borders of the United States. See id.

The earliest Supreme Court case which undertook a comparable task in respect to Section One of the Sherman Act determined that the presumption against extraterritoriality had not been overcome. In American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), the Court considered the application of the Sherman Act in a civil action concerning conduct which occurred entirely in Central America and which had no discernible effect on imports to the United States. Starting with what Justice Holmes termed "the general and almost universal rule" holding "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," id. at 356, and the ancillary proposition that, in cases of doubt, a statue should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power," id. at 357, the Court held that the defendant's actions abroad were not proscribed by the Sherman Act.

Our jurisprudence is precedent-based, but it is not static. By 1945, a different court saw a very similar problem in a somewhat softer light. In United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Alcoa), the Second Circuit, sitting as a court of last resort, see 15 U.S.C. § 29 (authorizing designation of a court of appeals as a court of last resort for certain antitrust cases), mulled a civil action brought under Section One against a Canadian corporation for acts committed entirely abroad which, the government averred, had produced substantial anticompetitive effects within the United States. The Alcoa court read American

Banana narrowly; that case, Judge Learned Hand wrote, stood only for the principle that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." Id. at 443. But a sovereign ordinarily can impose liability for conduct outside is borders that produces consequences within them, and while considerations of comity argue against applying Section One to situations in which no effect within the United States has been shown - the American Banana scenario - the statue, properly interpreted, does proscribe extraterritorial acts which were "intended to affect imports [to the United States] and did affect them." Id. at 444. On the facts of Alcoa, therefore, the presumption against extraterritoriality had been overcome, and the Sherman Act had been violated. See id. at 444-45.

Any perceived tension between American Banana and Alcoa was eased by the Supreme Court's most recent exploration of the Sherman Act's extraterritorial reach. In Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), the Justices endorsed Alcoa's core holding, permitting civil antitrust claims under Section One to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil. While noting American Banana's initial disagreement with this proposition, the Hartford Fire Court deemed it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796. The conduct alleged, a

London-based conspiracy to alter the American insurance market, met that benchmark.[3] See id.

To sum up, the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach. In arriving at this conclusion, we take no view of the government's asseveration that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a (1994), makes manifest Congress' intent to apply the Sherman Act extraterritorially. The FTAIA is inelegantly phrased and the court in Hartford Fire declined to place any weight on it. See Hartford Fire, 509 U.S. at 796 n.23. We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.

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[3] As NPI reminds us, four Justices dissented in Hartford Fire. This is cold comfort, however, for the dissenters expressed complete agreement with the majority's view on extraterritoriality. See Hartford Fire, 509 U.S. at 814 (Scalia, J., dissenting). By the same token, NPI's attempt to distinguish Hartford Fire on the ground that the defendants there conceded the United States' jurisdiction over their conduct fails for two reasons.

In the first place, the assertion is no more than a play on words. The majority opinion in Hartford Fire stated that the district court "undoubtedly" had jurisdiction over the civil claims, "as the London reinsurers apparently concede." Id. at 795. It is obvious, therefore, that jurisdiction did not depend on the concession; to the contrary, jurisdiction would "undoubtedly" have existed in any event. In the second place, one of the London defendants did not join in this apparent concession, but the Court nonetheless held that defendant's foreign conduct to be within the Sherman Act's proscriptive ambit because it was part of a scheme which "was intended to and did in fact produce a substantial effect on the American insurance market." Id. at 795 n.21.

B. The Merits.

Were this a civil case, our journey would be complete. But here the United States essays a criminal prosecution for solely extraterritorial conduct rather than a civil action. This is largely uncharted terrain; we are aware of no authority directly on point, and the parties have cited none.

Be that as it may, one datum sticks out like a sore thumb: in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statues: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Words may sometimes be chameleons, possessing different shades of meaning in different contexts, see, e.g., Hanover Ins. Co. v. United States, 880 F.2d 1503, 1504 (1st Cir. 1989), cert. denied, 493 U.S. 1023 (1990), but common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.

Common sense is usually a good barometer of statutory meaning. Here, however, we need not rely on common sense alone; accepted canons of statutory construction point in the same direction. It is a fundamental interpretive principle that identical words or terms used in different parts of the same act are intended to have the same meaning. See Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647, 655 (1996); Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995). This principle - which the Court recently called "the basic canon of statutory construction," Estate of

Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) - operates not only when particular phrases appear in different sections of the same act, but also when they appear in different paragraphs or sentences of a single section. See Russo v. Texaco, Inc., 808 F.2d 221, 227 (2d Cir. 1986) ("It is a settled principle of statutory construction that [w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.") (citations and internal quotation marks omitted); United States v. Gertz, 249 F.2d 662, 665 (9th Cir. 1957) (similar). It follows, therefore, that if the language upon which the indictment rests were the same as the language upon which civil liability rests but appeared in a different section of the Sherman Act, or in a different part of the same section, we would be under great pressure to follow the lead of the Hartford Fire Court and construe the two iterations of the language identically. Where, as here, the tie binds more tightly - that is, the text under consideration is not merely a duplicate appearing somewhere else in the statute, but is the original phrase in the original setting - the pressure escalates and the case for reading the language in a manner consonant with a prior Supreme Court interpretation is irresistible. See United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n.10 (1992) (plurality op.) (flatly rejecting the idea, while construing language from a statue with both civil and criminal implications, that a court should "refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation").

The Supreme Court confronted an analogous situation in Ratzlaf v. United States, 510 U.S. 135 (1994). There, the

court dealt with a single criminal penalty clause, contained in 31 U.S.C. § 5322(a) (1994), which authorized punishment for individuals "willfully violating" a number of separate statutory provisions. The defendant was charged under one of these provisions. After noting that identical terms appearing at multiple places within a single statute customarily have a consistent meaning, the Court said: "We have even stronger cause to construe a single formulation, here § 5322(a), the same way each time it is called into play." Id. at 143. The Ratzlaf Court proceeded to interpret the phrase "willfully violating" to incorporate the same mens rea requirement that had been read into the phrase when section 5322(a) was applied in other contexts. See id. at 136-37, 141. In so doing the Court quoted with approval our statement in United States v. Aversa, 984 F.2d 493, 498 (1st Cir. 1993) (en banc): "Ascribing various meanings to a single iteration . . . - reading the word differently for each code section to which it applies - would open Pandora's jar. If the courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated."

Ratzlaf is not our only teaching aid. This court recently confronted a situation that, putting together its successive stages, throws light upon the problem at hand. Having found an ambiguity in the phrase "cost of producing self-employment income," 7 U.S.C. § 2014(d)(9) (1994), we deferred to a reasonable administrative regulation interpreting it. See Strickland v. Commissioner, Me. Dep't of Human Servs., 48 F.3d 12, 21 (1st Cir.), cert. denied, 116 S. Ct. 145 (1995). In a subsequent suit involving the same parties, we debunked the plaintiff's contentions, advanced in a somewhat different context and in connection

with a neotenic legal theory, that the phrase in question had a plain meaning. We explained: "Statutory ambiguity does not flash on and off like a bank of strobe lights at a discotheque, shining brightly at the time of one lawsuit and then vanishing mysteriously in the interlude before the next suit appears." Strickland v. Commissioner, Me. Dep't of Human Servs., 96 F.3d 542, 547 (1st Cir. 1996). Read in the ensemble, the Strickland opinions stand for the proposition that the same phrase, appearing in the same portion of the same statute, cannot bear divergent interpretations in different litigation contexts.

The shared rationale of the Ratzlaf and Strickland cases reinforces the basis canon of construction and gives us confidence that we should follow the canon here. The words of Section One have not changed since the Hartford Fire Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding. Thus, unless some special circumstance obtains in this case, there is no principled way in which we can uphold the order of dismissal.

NPI and its amicus, the Government of Japan, urge that special reasons exist for measuring Section One's reach differently in a criminal context. We have reviewed their exhortations and found them hollow. We discuss the five most promising theses below. The rest do not require comment.

1. **Lack of Precedent.** NPI and its amicus make much of the fact that this appears to be the first criminal case in which the United States endeavors to extend Section One to

wholly foreign conduct. We are not impressed. There is a first time for everything, and the absence of earlier criminal actions is probably more a demonstration of the increasingly global nature of our economy than proof that Section One cannot cover wholly foreign conduct in the criminal milieu.

Moreover, this argument overstates the lack of precedent. There is, for example, solid authority for applying a state's criminal statute to conduct occurring entirely outside the state's borders. See Strassheim v. Daily, 221 U.S. 280, 285 (1911) (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."). It is not much of a stretch to apply this same principle internationally, especially in a shrinking world. See, e.g., Chua Han Mow v. United States, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (applying Strassheim principle to conduct in Malaysia involving drugs intended for distribution in the United States), cert. denied, 470 U.S. 1031 (1985); United States v. Hayes, 653 F.2d 8, 11 (1st Cir. 1981) (similar); cf. John Donne, Devotions Upon Emergent Occasions, no. 17 (1624) (warning that "no man is an island, entire of itself; every man is a piece of the continent, a part of the main").

2. **Difference in Strength of Presumption.** The lower court and NPI both cite United States v. Bowman, 260 U.S. 94 (1922), for the proposition that the presumption against extraterritoriality operates with greater force in the criminal arena than in civil litigation. This misreads the opinion. To be sure, the Bowman Court, dealing with a charged conspiracy to defraud, warned that if the criminal law "is to

be extended to include those [crimes] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." Id. at 98. But this pronouncement merely restated the presumption against extraterritoriality previously established in civil cases like American Banana, 213 U.S. at 357. The Bowman Court nowhere suggested that a different, more resilient presumption arises in criminal cases.[4]

Nor does United States v. United States Gypsum Co., 438 U.S. 422 (1978), offer aid and succor to NPI. Recognizing that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," id. at 440-41, the Gypsum Court held that criminal intent generally is required to convict under the Act. See id. at 443. Although this distinguishes some civil antitrust cases (in which intent need not be proven) from their criminal counterparts, the Gypsum court made it plain that intent need not be shown to prosecute criminally "conduct regarded as per se illegal because of its unquestionably anticompetitive effects." Id. at 440. This means, of course, that defendants can be convicted of participation in price-fixing conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws. See, e.g., United States v. Brown, 936 F.2d 1042, 1046 (9th Cir. 1991); United States v.

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[4] Indeed, the Bowman Court stated that it regarded American Banana as an appropriate analogy because the antitrust statute "is criminal as well as civil." 260 U.S. at 98. This seems to support the notion that the presumption is the same in both instances and leaves little room to argue that the Bowman Court was attempting to craft a special, more rigorous rule for criminal proceedings.

Society of Indep. Gas. Marketers, 624 F.2d 461, 465 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); United States v. Gillen, 599 F.2d 541, 544-45 (3d Cir.), cert. denied, 444 U.S. 1078 (1979). Because the instant case falls within that rubric, Gypsum does not help NPI.

We add that even if Gypsum had differentiated between civil and criminal price-fixing cases, NPI's reliance on it would still be problematic. Reduced to bare essence, Gypsum focuses on mens rea, noting that centuries of Anglo-American legal tradition instruct that criminal liability ordinarily should be premised on malevolent intent, see id. at 436-37, whereas civil liability, to which less stigma and milder consequences commonly attach, often requires a lesser showing of intent. There is simply no comparable tradition or rationale for drawing a criminal/civil distinction with regard to extraterritoriality, and neither NPI nor its amicus have alluded to any case which does so.

3. **The Restatement.** NPI and the district court, 944 F. Supp. at 65, both sing the praises of the Restatement (Third) of Foreign Relations Law (1987), claiming that it supports a distinction between civil and criminal cases on the issue of extraterritoriality. The passage to which they pin their hopes states:

> [I]n the case of regulatory statues that may give rise to both civil and criminal liability, such as the United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Id. at § 403 cmt. f. We believe that this statement merely reaffirms the classic presumption against extraterritoriality - no more, no less. After all, nothing in the text of the Restatement proper contradicts the government's interpretation of Section One. See, e.g., id. at § 402(1)(c) (explaining that, subject only to a general requirement of reasonableness, a state has jurisdiction to proscribe "conduct outside its territory that has or is intended to have substantial effect within its territory");[5] id. at § 415(2) ("Any agreement in restraint of United States trade that is made outside of the United States . . . [is] subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce."). What is more, other comments indicate that a country's decision to prosecute wholly foreign conduct is discretionary. See, e.g., id. at § 403 rep. n.8.

4. **The Rule of Lenity.** The next arrow which NPI yanks from its quiver is the rule of lenity. The rule itself is venerable; it provides that, in the course of interpreting statutes in criminal cases, a reviewing court should resolve ambiguities affecting a statute's scope in the defendant's favor. See, e.g., Hughey v. United States, 495 U.S. 411, 422 (1990); Crandon v. United States, 494 U.S. 152, 158 (1990); United States v. Gibbens, 25 F.3d 28, 35 (1st Cir. 1994); United States v. Ferryman, 897 F.2d 584, 591 (1st Cir.), cert. denied, 498 U.S. 830 (1990). But the rule of lenity is inapposite unless a statutory ambiguity looms, and a statute is not ambiguous for this purpose simply because

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[5] We note in passing that, by their use of the disjunctive in this section, the drafters of the Restatement seem to suggest a more permissive standard than we, and other American courts, see, e.g., Alcoa, 148 F.2d at 444, would deem meet.

some courts or commentators have questioned its proper interpretation.[6] See Reno v. Koray, 115 S. Ct. 2021, 2029 (1995); Moskal v. United States, 498 U.S. 103, 108 (1990). Rather, "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." Reno, 115 C. Ct. at 2029 (citations, internal quotation marks, and certain brackets omitted); accord United States v. O'Neil, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (describing the rule of lenity as "a background principle that properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure"). Put bluntly, the rule of lenity cannot be used to create ambiguity when the meaning of a law, even if not readily apparent, is, upon inquiry, reasonably clear.

That ends the matter of lenity. In view of the fact that the Supreme Court deems it "well established" that Section One of the Sherman Act applies to wholly foreign conduct, Hartford Fire, 509 U.S. at 796, we effectively are foreclosed from trying to tease an ambiguity out of Section One relative to its extraterritorial application. Accordingly, the rule of lenity plays no part in the instant case.

5. Comity. International comity is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law. See Harold G. Maier,

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[6] Leaving aside the lower court's decision in this case, no reported opinion has questioned the applicability of Hartford Fire's exercise in statutory construction to the precincts patrolled by the criminal law. Nevertheless, Hartford Fire's rendition of the statute has drawn criticism from the academy. See, e.g., Kenneth W. Dam, Extraterritoriality in an Age of Globalization: The Hartford Fire Case, 1993 Sup. Ct. Rev. 289, 307-13 (1993).

Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 A.J. Int'l L. 280, 281 n.1 (1982). Comity is more an aspiration than a fixed rule, more a matter of grace than a matter of obligation. In all events, its growth in the antitrust sphere has been stunted by Hartford Fire, in which the Court suggested that comity concerns would operate to defeat the exercise of jurisdiction only in those few cases in which the law of the foreign sovereign required a defendant to act in a manner incompatible with the Sherman Act or in which the full compliance with both statutory schemes was impossible. See Hartford Fire, 509 U.S. at 798-99; see also Kenneth W. Dam, Extraterritoriality in an Age of Globalization: The Hartford Fire Case, 1993 Sup. Ct. Rev. 289, 306-07 (1993). Accordingly, the Hartford Fire Court gave short shrift to the defendant's entreaty that the conduct leading to antitrust liability was perfectly legal in the United Kingdom. See Hartford Fire, 509 U.S. at 798-99.

In this case the defendant's comity-based argument is even more attenuated. The conduct with which NPI is charged is illegal under both Japanese and American laws, thereby alleviating any founded concern about NPI being whipsawed between separate sovereigns. And, moreover, to the extent that comity is informed by general principles of reasonableness, see Restatement (Third) of Foreign Relations Law § 403, the indictment lodged against NPI is well within the pale. In it, the government charges that the defendant orchestrated a conspiracy with the object of rigging prices in the United States. If the government can prove these charges, we see no tenable reason why principles of comity should shield NPI from prosecution. We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it take to tell the tale. Thus, a ruling in NPI's favor would create perverse incentives for those who would

use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

We need go no further. Hartford Fire definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States. We are bound to accept that holding. Under settled principles of statutory construction, we also are bound to apply it by interpreting Section One the same way in a criminal case. The combined force of these commitments requires that we accept the government's cardinal argument, reverse the order of the district court, reinstate the indictment, and remand for further proceedings.

Reversed and remanded.

- Concurring Opinion follows -

LYNCH, Circuit Judge (concurring). The question presented in this case is whether Section One of the Sherman Act authorizes criminal prosecutions of defendants for their actions committed entirely outside the United States. Judicial precedents, culminating with the Supreme Court's decision in Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993), conclusively establish that Section One's jurisdictional reach extends, in civil actions, to foreign conduct that is meant to produce, and does in fact produce, substantial effects in the United States. The next question to be asked is whether there is any persuasive reason to believe that, with regard to wholly foreign conduct, Section One in the criminal context is not co-extensive with Section One in the civil context.

In answering this second question, courts must be careful to determine whether this construction of Section

One's criminal reach conforms with principles of international law. "It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" Weinberger v. Rossi, 456 U.S. 25, 32 (1982). In the Alcoa case, Judge Learned Hand found this cannon of construction relevant to determining the substantive reach of the Sherman Act, observing that "we are not to read general words [i.e., Section One] . . . without regard to the limitations customarily observed by nations upon the exercise of their powers." United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); see also Hartford Fire, 509 U.S. at 814-15 (Scalia, J., dissenting).

The task of construing Section One in this context is not the usual one of determining congressional intent by parsing the language or legislative history of the statute. The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary. The Supreme Court has called the Sherman Act a "charter of freedom" for the courts, with "a generality and adaptability comparable to that found . . . in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). As Professors Areeda and Turner have said, the federal courts have been invested "with a jurisdiction to create and develop an 'antitrust law' in the manner of the common law courts." I Areeda & Turner, Antitrust Law ¶ 106, at 15 (1978).[7] The courts are aided in this task by canons of statutory construction, such as the presumption against violating

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[7] Professors Areeda and Turner also note that "judges sometimes talk as if Congress has already decided the question before them. This is usually a misconception." Id.

international law, which serve as both guides and limits in the absence of more explicit indicia of congressional intent.

Here, we are asked to determine the substantive content of Section One's inexact jurisdictional provision, "commerce . . . with foreign nations." 15 U.S.C. § 1, Because of the "compunctions against the creation of crimes by judges rather than by legislators," II Areeda & Hovenkamp, Antitrust Law ¶ 311b, at 33 (1995 rev. ed.), the constitution-like aspects of the antitrust laws must be handled particularly carefully in criminal prosecutions.

As the antitrust laws give the federal enforcement agencies a relatively blank check, the development of antitrust law has been largely shaped by the cases that the executive branch chooses - or does not choose - to bring. Accordingly it has been said that:

> novel interpretations or great departures have seldom, if ever, occurred in criminal cases, which prosecutors have usually reserved for defendants whose knowing behavior would be generally recognized as appropriate for criminal sanctions.

Id. at 34. This case does present a new interpretation. We are told this in the first instance in which the executive branch has chosen to interpret the criminal provisions of the Sherman Act as reaching conduct wholly committed outside of this country's borders.

Changing economic conditions, as well as different political agendas, mean that antitrust polices may change from administration to administration. The present administration has promulgated new Antitrust Enforcement Guidelines for International Operations which "focus primarily on situations in which the Sherman Act will grant

jurisdiction and when the United States will exercise the jurisdiction" internationally. Brockbank, The 1995 International Antitrust Guidelines: The Reach of U.S. Antitrust Law Continues to Expand, 2 J. Int'l Legal Stud. 1, *22 (1996). The new Guidelines reflect a stronger enforcement stance than earlier versions of the Guidelines, and have been described as a "warning to foreign governments and enterprises that the [antitrust enforcement] Agencies intend to actively pursue restraints on trade occurring abroad that adversely affect American markets or damage American exporting opportunities." Id. at *21. The instant case is likely a result of this policy.

It is with this context in mind that we must determine if the exercise of jurisdiction occasioned by the decision of the executive branch of the United States is proper in this case. While courts, including this one, speak of determining congressional intent when interpreting statutes, the meaning of the antitrust laws has emerged through the relationship among all three branches of government. In this criminal case, it is our responsibility to ensure that the executive's interpretation of the Sherman Act does not conflict with other legal principles, including principles of international law.

That question requires examination beyond the language of Section One of the Sherman Act. It is, of course, generally true that, as a principle of statutory interpretation, the same language should be read the same way in all contexts to which the language applies. But this is not invariably true. New content is sometimes ascribed to statutory terms depending upon context. Cf. Robinson v. Shell Oil Co., 117 S. Ct. 843, 847 (1997) (depending on context, statutory term may have different meanings in different sections of single statute); 3 Sutherland, Statutory Construction § 60.04 (5th ed. 1995) (statutes with both

remedial and penal provisions may be construed liberally in remedial context and strictly in penal context). As NPI and the Government of Japan point out, the Supreme Court has held that Section One of the Sherman Act, which defines both criminal and civil violations with one general phrase,[8] "should be construed as including intent as an element" of a criminal violation. United States v. United States Gypsum Co., 438 U.S. 422, 443 (1978). Where Congress intends that our laws conform with international law, and where international law suggests that criminal enforcement and civil enforcement be viewed differently, it is at least conceivable that different content could be ascribed to the same language depending on whether the context is civil or criminal. It is then worth asking about the effect of the international law which Congress presumably also meant to respect.

The content of international law is determined "by reference 'to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.'" Hilao v. Marcos, 103 F.3d 789, 794 (9th Cir. 1996) (quoting The Paquete Habana, 175 U.S. 677, 700 (1990)); see also Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). The Restatement (Third) of the Foreign Relations Law of the United States restates international law, as derived from customary international law and from international agreements to which the United States is a party, as it applies to the United States. See Restatement (Third) of the Foreign Relations Law of the United States §§ 1, 101 (1987) [hereinafter Restatement]. The United States courts have treated the Restatement as an illuminating outline of central principles of international law. See Hartford Fire, 509 U.S. at 799 (citing Restatement); Hartford Fire, 509

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[8] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ." 15 U.S.C. § 1.

U.S. at 818 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles . . . and in the decisions of other federal courts . . . ."); In re Maxwell Communications Corp., 93 F.3d 1036, 1047-48 (2d Cir. 1996).

The Restatement articulates principles, derived from international law, for determining when the United States may properly exercise regulatory (or prescriptive) jurisdiction over activities or persons connected with another state. It serves as a useful guide to evaluating the international interests at stake. Sections 402 and 403 articulate general principles. See Restatement §§ 402, 403. Section 415 applies these principles to "Jurisdiction to Regulate Anti-Competitive Activities." Id. § 415.

Restatement Section 402(1)(c) states that "Subject to § 403," a state has jurisdiction to prescribe law to "conduct outside its territory that has or is intended to have substantial effect within its territory." Id. §402(1)(c). Section 403(1) states that, even when Section 402 has been satisfied, jurisdiction may not be exercised if it is "unreasonable." Id. § 403(1). Section 403(2) lists factors to be evaluated in determining if jurisdiction is reasonable:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and

the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Id. § 403(2).[9]

Comment f to Section 403 states that the principles of Sections 402 and 403 "apply to criminal as well as to civil regulation." Id. § 403 cmt. f. But, specifically naming the United States antitrust laws, the comment also says that for statutes that give rise to both types of liability, "the presence of substantial foreign elements will ordinarily weight against application of criminal law." Id. The comment argues that legislative intent to apply these laws criminally should only be found on the basis of "express statement or clear implication." Id.

While the majority opinion accurately states that this comment is an expression of the clear statement rule, the comment also implies that there are special concerns associated with the imposition of criminal sanctions on foreign conduct. See also id. § 403 n.8 ("In applying the principle of reasonableness, the exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive."). Indeed, most people recognize a distinction between civil and criminal liability; that the law of nations should do so as well is not surprising.[10] And while Hartford Fire and earlier judicial decisions have found that the antitrust laws do apply, in the civil context, to foreign conduct, this antitrust common law is not the express

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[9] Section 403(3) is not applicable here. See id. § 403(3) cmt. e.

[10] Enforcement of criminal laws against foreign nationals for conduct on foreign soil may affect that country's relationship with the foreign country in somewhat different ways than would a civil action. Congress could choose to provide more explicit guidance to the executive and the courts in this area if it is concerned about such impacts on foreign relations.

statement of legislative intent that the Restatement suggests may be appropriate in the criminal context.

Also relevant to the present inquiry is section 415(2), which states that:

> Any agreement in restraint of United States trade that is made outside of the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States and the agreement or conduct has some effect on that commerce.

Restatement § 415(2). Comment a to Section 415 states that the reasonableness principles articulated in Section 403 must still be satisfied. See id cmt. a.

Application of these principles to the indictment at issue here leads to the conclusion that the exercise of jurisdiction is reasonable in this case. Here, raising prices in the United States and Canada was not only a purpose of the alleged conspiracy, it was the purpose, thus satisfying Section 415's "principle purpose" requirement. Moreover, Section 415's requirement of "some effect" on United States markets is amply met here. The indictment alleges that NPI sold $6.1 million of fax paper into the United States during 1990, approximately the period covered by the charged conspiracy. In 1990, total sales of fax paper in North American were approximately $100 million. NPI's price increases thus affected a not insignificant share of the United States market.

These same factors weigh heavily in the Section 403 reasonableness analysis. Because only North American

markets were targeted, the United States' interest in combatting this activity appears to be greater than the Japanese interest, which may only be the general interest of a state in having its industries comport with foreign legal norms. Japan has no interest in protecting Japanese consumers in this case as they were unaffected by the alleged conspiracy. The United States, in contrast, has a strong interest in protecting the United States consumers, who were affected by the increase in prices. In this situation, it may be that only the United States has sufficient incentive to pursue the alleged wrongdoers, thereby providing the necessary deterrent to similar anticompetitive behavior. In another case, where the consumers of the situs nation were injured as well, the state's interest in regulating anticompetitive conduct might be stronger than it is here.

Other Section 403 factors also counsel in favor of the exercise of jurisdiction here. The effects on United States markets were foreseeable and direct. The Government of Japan acknowledges that antitrust regulation is part of the international legal system, and NPI does not really assert that it has justified expectations that were hurt by the regulation.[11] The only factor counseling against finding that the United States' antitrust laws apply to this conduct is the fact that the situs of the conduct was Japan and that the principals were Japanese corporations. This consideration is inherent in the nature of jurisdiction based on effects of conduct, where the situs of the conduct is, by definition, always a foreign country. This alone does not tip the balance against jurisdiction.

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[11] While criminal prosecution may come as a surprise, NPI should have known that civil antitrust liability could include treble damages. A corporation found guilty of a criminal violation of Section One is subject to a fine not exceeding $10 million. See 15 U.S.C. § 2. Treble damages obviously do not include a similar cap.

For these reasons, I agree with the majority that the district court erred in dismissing the indictment.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITES STATES OF AMERICA,	*	
	*	
v.	*	
	*	CR No.
NIPPON PAPER INDUSTRIES CO.,	*	95-10388-JLT
LTD.; JUJO PAPER CO., INC.;	*	
and HIRINORI ICHIDA;	*	
Defendants.	*	

ORDER

September 3, 1996

TAURO, Ch.J.,

For the reasons stated in the accompanying memorandum, the court orders as follows:

1. Nippon Paper Industries Co., Ltd.'s ("Nippon") Motion [29] to Dismiss Count One Of The Indictment For Lack Of Personal Jurisdiction is DENIED;

2. Nippon's Motion [66] To Dismiss Count I Of The Indictment For Failure To State An Offense Under 15 U.S.C. § 1 is ALLOWED and the Indictment is hereby DISMISSED as to Nippon and Jujo Paper Co., Inc.; and

3. Nippon's Motion [64] To Dismiss Count I Of The Indictment For Failure To State An Offense is DENIED as moot.

IT IS SO ORDERED.

United States District Judge

I.

BACKGROUND[12]

Nippon is a Japanese corporation with its principle place of business in Tokyo, Japan. Nippon was formed in 1993 as a result of a merger between Jujo and Sanyo Kokusaku Co., Ltd., both Japanese corporations with their principal places of business in Japan.

In 1990, Jujo manufactured fax paper at mills located in Japan. Jujo did not engage in direct export sales but, rather, sold its fax paper in Japan to Japanese trading houses. With regard to fax paper manufactured by Jujo that ultimately reached customers in the United States, Jujo's sales were limited to two Japanese trading companies, Japan Pulp & Paper Co., Ltd. ("JPP") and Mitsui & Co., Ltd. ("Mitsui"). JPP and Mitsui exported the fax paper to their respective subsidiaries in the United States and those subsidiaries engaged in direct sales to customers in the United States.

The government maintains that the conspiracy originated at meetings held in Japan in early 1990, during which Jujo and other Japanese manufacturers of fax paper "agreed to increase prices for fax paper to be imported in North America." Indictment ¶ 7(b). Although the indictment does not specify which alleged co-conspirators attended these meetings, the government conceded at argument on this motion that none of the Japanese trade houses nor their American subsidiaries participated in these meetings.

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[12] In outlining its background, the court accepts the government's characterization of the case as a conspiracy involving horizontal and vertical relationships. As explained in detail below, the parties dispute whether the indictment adequately pleads the theories of the conspiracy advanced by the government in its memorandum opposing Nippon's motion for failure to state a claim under section 1 of the Sherman Act.

To effectuate this conspiracy, Jujo and the other manufacturers "raised their prices for fax paper" charged to the Japanese trading houses. The government further contends that Mitsui and JPP, and their American subsidiaries, became co-conspirators by agreeing to sell fax paper in North America at the newly raised price.

II.

DISCUSSION

A. Personal Jurisdiction

Congress, by way of the Federal Rules of Criminal Procedure, has provided for nationwide service of process of criminal summons. Fed. R. Crim. P. 4(d)(2). Service of process on a corporation may be effected within the territorial limits of the United States by:

> delivering a copy [of the summons] to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at is principal place of business elsewhere in the United States.

Fed. R. Crim. P. 9(c)(1).

On January 4, 1996, service by certified mail of a criminal summons was made upon Seiichi Masuko, the general manager of the larger of the two Nippon offices in Seattle. In January 1996, service of a copy of the criminal summons was made on Richard Parker, a partner of O'Melveny & Myers, who had been active in the law firms representation of Nippon throughout the grand jury investigation leading to the present indictment. Subsequently, in-hand service of the

criminal summons on Seiichi Masuko was executed by a United States Marshal at Nippon's Seattle office.[13]

The government contends that the court has jurisdiction over Nippon merely because a summons was served on Seiichi Mausko within the territorial boundaries of the United States pursuant to Rule 4. Alternatively, the government maintains that, because Nippon has sufficient contacts with the United States, service pursuant to Rule 4 gives this court jurisdiction over Nippon.

1. Review of jurisdictional principles

"Personal jurisdiction implicates the power of a court over a defendant." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 143 (1st Cir. 1995). Historically, the presence of a defendant within the boundaries of the sovereign served as a prerequisite to its courts exercising jurisdiction over him. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Once presence existed, the manner in which such presence was procured did not alter the power of the court over that person. See, e.g., Frisbie v. Collins, 342 U.S. 519, 522 (1952) (jurisdiction existed over criminal defendant brought within border of sovereign by forcible abduction); Chandler v. United States, 171 F.2d 921, 933 (1st Cir. 1948) (court may not refuse jurisdiction where fugitive is brought before it regardless of the means used to bring him within its territorial jurisdiction), cert. denied, 336 U.S. 918 (1949).

With the advent of personal service of process, the scope of a sovereign's power expanded to include, under certain

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[13] Nippon previously challenged the propriety of the service of process. On March 13, 1996, Chief Magistrate Judge Alexander denied Nippon's motion to quash. Nippon does not here challenge that decision.

conditions, persons not present in its territory. International Shoe, 326 U.S. at 316. Exercise of jurisdiction over persons not found within a sovereign's borders was held to be consistent with due process if the defendant has "certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. The modern doctrine of personal jurisdiction, thus, involves two distinct and independent bases for exercise of a sovereign's power: (1) physical presence of the person within the territorial boundaries of the sovereign, and (2) sufficient contacts with the sovereign to justify reaching him extraterritorially.

With respect to the latter basis for jurisdiction, the First Circuit has developed the doctrines of general and specific jurisdiction. United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp., 960 F.2d 1080, 1088 (1st Cir. 1992). A court has general jurisdiction over a person "when the litigation is not directly based on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." Id. If general jurisdiction is lacking, a court determines whether it possesses specific jurisdiction by examining (1) the relatedness of the defendant's forum-state activities and the claim underlying the litigation, (2) the deliberateness of the defendant's contacts with the forum-state and (3) the reasonableness of the exercise of jurisdiction in light of various Gestalt factors. Pritzker v. Yari, 42 F.3d 53, 60-61 (1st Cir. 1994), cert denied, -- U.S. -, 115 S. Ct. 1959 (1995).

Turning to adjudication of federal claims in federal courts, two factors must be examined: (1) the territorial limits on service of process defined by Congress, and (2) the constitutional constraints on Congress' definition of those

limits. See, e.g., S.E.C. v. Unifund Sal, 910 F.2d 1028, 1033 (2nd Cir. 1990). Courts have recognized that Congress may provide for nationwide service of process. Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987), cert. denied, 485 U.S. 1007 (1988). In providing for nationwide service, Congress defines the territorial jurisdiction of the federal courts as encompassing the entire nation. Id. at 671-72. As such, the Due Process Clause of the Fifth Amendment does not require that a defendant have sufficient contacts with the state in which the district court sits for there to be jurisdiction. Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 n.3 (1st Cir. 1984); Debreceni v. Bru-Jell Leasing Corp., 710 F. Supp. 15, 20-1 (D. Mass. 1989).

With these principles in mind, the court turns to the issues raised by the parties: (1) whether Congress can authorize federal courts to exercise jurisdiction over an alien corporation, without regard to the contacts of that corporation to the United States, (2) whether service under Rule 4 authorizes a federal district court to exercise personal jurisdiction over an alien corporation, regardless of the substantiality of the contacts of that corporation with the state in which the district court sits, and (3) whether Nippon has sufficient contacts with the United States to warrant exercise of jurisdiction over it.

2. Jurisdiction by virtue of service in the United States

The government contends that service under Rules 4 and 9, standing alone, is sufficient to create jurisdiction over Nippon. In advancing this position, the government argues by analogy from cases concerning the presence of individual criminal defendants. The Supreme Court explained in Frisbee:

> The Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436 [1886] that the power of the court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now present to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of a crime after having been fairly apprised of the charges against him and after a fair trail in accordance with constitutional safeguards."

342 U.S. at 533. (emphasis added). As Frisbee implies, minimum contacts considerations do not apply to individuals who are served process within the territorial limits of the sovereign. Burnham v. Superior Court of California, 495 U.S. 604, 622 (1990) (plurality opinion) (Scalia, J.); Johnson Creative Arts, 743 F.2d at 950 n.3. And so, the government contends, service on an agent within the territory of the United States establishes the presence of an alien corporation.

The principal problem with the government's analogy lies with the concept of corporate presence. Corporations are legal constructions and their presence is, in some sense, fixed to the situs of their incorporation. Where nationwide service is applied to an American corporation this does not present a problem, insofar as jurisdiction can be acquired by service in its state of incorporation. But, process on an alien corporation at its place of incorporation would, of course, take place beyond the territorial limits of the United States.

Moreover, the government's suggestion that service on an officer of an alien corporation within the United States functions as the surrogate for the presence of the alien corporation leads to incongruous results. Consider service of process on the president of an alien corporation who

merely happens to be vacationing in Florida, or changing airplanes at an American airport in route to a foreign destination. Is the corporation really "present" in the United States under such happenstance? As Judge Hand recognized, one cannot "impute the idea of locality to a corporation, except by virtue of those Acts which realize its purposes." Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2nd Cir. 1930). The vacationing foreign corporation president is likely not acting to serve his employer's purposes. Indeed, it was the problem of corporate presence that led the Supreme Court to articulate the minimum contacts test in International Shoe. International Shoe, 326 U.S. at 315-19. See also Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017, 1020-23 (2nd Cir. 1978) (explaining rise and fall of the corporate presence theory in the context of states' efforts to reach foreign corporations).

Further, contrary to the government's contention, the minimum contacts test is not limited to cases involving extraterritorial service on a corporation. In International Shoe, an agent of the corporate defendant had been served within the forum-state, pursuant to a state statute authorizing in-state service of process on agents of foreign corporations. International Shoe, 326 U.S. at 311. As such, the issue before the Court involved the limits imposed by due process on a sovereign's efforts to obtain in personam jurisdiction over a foreign corporation by in-state service on one of its agents. In holding that the sovereign only obtains personal jurisdiction where there are sufficient contacts, the Court implicitly found that the mere act of service on the agent did not render the corporation "present" in the state.

For these reasons, this court holds that the mere service of process on an agent or officer of an alien corporation within the United States does not without more establish the jurisdiction of a federal court over an alien corporation.

Rather, as this court has previously decided in the context of a civil matter, service of such process is only effective to create in personam jurisdiction where a defendant has sufficient contacts with the United States. See Debreceni, 710 F. Supp. at 20-21 (where federal statute provides for nationwide service of process for a federal claim, the Constitution merely requires minimum contacts with the United States).

3. Nationwide service in criminal antitrust actions

Though Congress may bestow on a federal district court personal jurisdiction over an alien corporation without regard to the contacts between the district and the defendant, the question remains whether Congress has done so in this case. Nippon contends that the court should not construe Rules 4 and 9 of the Federal Rules of Criminal Procedure as providing federal district courts with jurisdiction on the sole basis of national contacts in criminal antitrust actions. Nippon advances two alternative arguments in support of this contention.

First, Nippon maintains that section 12 of the Clayton Act, 15 U.S.C.A. § 22 (West 1973), is the exclusive provision for nationwide service in antitrust cases. Section 12 of the Clayton Act provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C.A. § 22. Because prosecution in this district allegedly does not satisfy section 12's venue provision, Nippon avers that this court cannot exercise jurisdiction.

It is not clear, however, that section 12 of the Clayton Act applies to criminal prosecutions under the Sherman Act. See United States v. National Malleable & Steel Castings Co., 6 F.2d 40, 43 (N.D. Ohio) (1924) (section 12 of the Clayton Act applies only to civil suits). Moreover, even if section 12 applies to criminal actions, the cases interpreting section 12 demonstrate that it was intended to supplement rather than supplant general federal venue and service of process statues and rules. See, e.g., Board of County Comm'rs of Custer County v. Wilshire Oil Co. of Texas, 523 F.2d 125, 129-30 (10th Cir. 1975). Accordingly, the court concludes that service under Rules 4 and 9 may be relied on in federal antitrust prosecutions.

Second, Nippon contends that jurisdiction on the basis of national contacts is permitted only when the provision authorizing nationwide service also limits venue to a federal district in which the alien corporation can be found.[14] Any other reading, Nippon suggests, would violate due process. Nippon cites no authority for this novel proposition and the court has found none. The reason for this absence of precedent is found in the Constitution itself, which imposes specific limits on the place of a criminal prosecution. Article III, section 2 requires that trial of crimes shall be held in the state where the crime was committed. The Sixth Amendment provides that criminal defendants are entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed." In light of the Constitution's venue and vicinage provisions, this court will not divine a generalized due process right requiring an

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[14] Fed. R. Crim. P. 18 limits venue to a district in which the offense was committed. For purposes of its motion to dismiss for lack of personal jurisdiction, Nippon does not challenge the government's allegation that co-conspirators committed overt acts in Massachusetts in furtherance of the conspiracy.

additional nexus between a criminal defendant and a federal juridical district.[15] See generally O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 114 S. Ct. 2048, 2054 (1994) (expression of one thing implies exclusion of others).

Moreover, the proposition advanced by Nippon has been rejected by the Supreme Court. In United States v. Union Pacific R.R., 98 U.S. (8 Otto) 569, 603-04 (1878), the Court held that Congress could make a court in Washington, D.C. the exclusive forum for certain claims arising under federal law. If Congress can establish one court within the United States to here all claims with regard to a defendant's contacts to that place, it inescapably follows that Congress can designate any place within the United States as an appropriate forum for federal claims.

Accordingly, this court concludes that the absence of a provision in the Federal Rules of Criminal Procedure linking the venue of a criminal action to contacts with the defendant, does not mandate a reading of Rule 4 as limiting personal jurisdiction to federal districts with which the defendant has sufficient contact.

4. Nippon's contacts with the United States

Disposition of the present motion depends, then, on whether Nippon has sufficient contacts with the United States to fall within the court's general or specific jurisdiction.

Since its inception in 1993, Nippon has maintained two offices in Seattle, Washington that Jujo previously operated.

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[15] The court notes that some courts have suggested that due process may protect against abusive selection of a venue by the federal government. See Petition of Provoo, 17 F.R.D. 183 (D. Md.), aff'd, 350 U.S. 857 (1955). There is, however, no suggestion in this case that the prosecution has acted in bad faith in selection the present forum.

These offices are staffed by eight employees. One of these offices engages in market research and quality inspections, as well as arranging for the annual transportation to Japan of over $270 million worth of newsprint, publishing paper, and wood chips purchased by Nippon in the United States. Nippon's other Seattle office negotiates contracts for and purchases annually approximately $40 million in logs and lumber from suppliers in the United States for export to Nippon's production facilities in Japan. The Seattle offices maintain bank accounts in the United States through which Nippon pays for purchases of materials exported to Japan, employee salaries, and office expenses.

Additionally, Nippon owns twenty percent of North Pacific Paper Corporation, Inc. ("NORPAC"), a paper manufacturing corporation located in Longview, Washington. NORPAC generates annual revenues of approximately $350 million.

Finally, Nippon officers and directors routinely travel to the United States to conduct business with its suppliers in the United States, to oversee operations of NORPAC, to attend industry conferences, and to negotiate technological agreements.

In light of these contacts, the court concludes that Nippon has engaged in continuous and systematic activity in the United States. Accordingly, the court possesses general personal jurisdiction over Nippon.

B. Extraterritorial Application of Section 1 of the Sherman Act

The court now turns to Nippon's motion to dismiss the indictment for failure to state an action under section 1 of the Sherman Act. Nippon maintains that the indictment charges Nippon, as Jujo's successor, with entering into a horizontal agreement with Japanese manufacturers to fix

prices, with selling fax paper to Japanese trading houses in Japan at that price, and directing the Japanese trading houses to resale the fax paper at certain prices. On this characterization of the indictment, the criminal conduct alleged occurred wholly in Japan and was wholly committed by Japanese manufacturers of fax paper. Nippon contends the criminal provisions of the Sherman Act do not apply to conduct wholly occurring outside the United States.

The government responds in two ways. First, it maintains that the indictment alleges that the Japanese trading companies and their American subsidiaries joined Jujo in the conspiracy by entering into a vertical agreement to fix the resale price of fax paper in the United States. As such, the government suggests that Nippon's characterization of the indictment as attempting to reach acts solely occurring outside the United States goes awry. Alternatively, the government contends that the criminal provisions of the Sherman Act can reach wholly foreign acts where the intent and effect of those acts is to affect commerce in the United States.

To resolve this motion, then, the court must address two questions: (1) whether the government has sufficiently pled its claim that a vertical agreement existed between Jujo and the trading houses; and (2) if not, whether the Sherman Act reaches the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper.

1. Adequacy of pleading the vertical agreement

An indictment must contain essential facts constituting an offense charged and must set forth every essential element of an alleged offense. Fed. R. Crim. Pro. Rule 7(c)(1). See, e.g., United States v. McDonough, 959 F.2d 1137, 1140 (1st Cir. 1992). The essential elements of a Sherman Act indictment are the time, place, manner, means, and effect of

an alleged violation. United States v. Tedesco, 441 F. Supp. 1336, 1339 (M.D. Pa. 1977).

In Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), the Supreme Court propounded the evidentiary requirements of proving a vertical agreement to fix resale prices. Compliance by a distributor with a manufacturer's unilateral directive to resell its product at a certain price does not constitute an agreement to conspire on the part of the distributor. Id. at 764. The evidence regarding the action of the distributor, therefore, must be of a nature that excludes the possibility the manufacturer and distributor were acting independently. Id. at 764. Indeed, the evidence must demonstrate that the manufacturer and distributor "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Id. So, for example, neither the fact that a manufacturer has directed a retailer to sell at a certain price and the distributor complies with that direction, nor the fact that the retailer exchanges sales information with the manufacturer, support an inference of a vertical price-fixing scheme. Id. at 762-64.

Monsanto's articulation of what conduct may permissibly give rise to an inference of an agreement is germane to whether the indictment adequately describes the existence of a conspiracy between the trading houses and Jujo. In making that determination, the court looks for either an allegation that an express agreement was entered into between Jujo and the trading houses, or a description of alleged conduct from which the reader could infer such an agreement. For the reasons that follow, the court concludes that the indictment fails to adequately plead the existence, manner, and means of a vertical price fixing agreement between Jujo and the Japanese trading companies.

As an initial matter, the court observes that the indictment does adequately aver that, at meetings in early 1990, Jujo

and co-conspirators explicitly agreed to price increases in fax paper. Indictment ¶ 7(b). The government concedes, however, that it is not proceeding under the theory that the Japanese trading companies attended the meetings at which this alleged explicit agreement was formed. Transcript of July 29, 1996 Hearing at 23.

Apart from the specific allegation that an agreement was reached at the early 1990 meetings, there is no other language in the indictment indicating that a subsequent vertical agreement arose between Jujo and the Japanese trading houses. In paragraphs 7(d) and 7(e), the indictment states that Jujo "directed the co-conspirator trading houses to implement price increases to fax paper customers in North America" and "participated in telephone conversations and otherwise contacted each other to maintain continued adherence to their conspiratorial agreement." This completes the indictment's characterization of the means and method of the conspiracy. Neither direction by Jujo to the trading houses nor communication by Jujo to determining compliance with that direction, imply the existence of a vertical agreement between Jujo and the trading houses.

Examining the indictment's description of the affects of the alleged conspiracy yields even less indication that a vertical agreement is alleged. Paragraph 9 of the indictment reads: "[t]he Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to customers at specified prices." It continues: "[t]he Japanese manufacturers . . . monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged." Again, these averments merely suggest that, to ensure the success of its horizontal agreement, Jujo undertook to direct the trading houses to sell fax paper at a specified price and to monitor

whether the trading houses were complying with this directive. Neither of these allegations serve as an averment that the trading houses entered into a price fixing agreement with Jujo.

In sum, except for the naked characterization of the trading houses as co-conspirators, the indictment merely alleges: (1) that Jujo directed the trading houses, (2) that Jujo communicated with the trading houses, and (3) that the trading houses served as the distributive link between Jujo and purchasers of fax paper in the United States. This court concludes that such allegations, singly or in combination, do not satisfy the government's burden of pleading with requisite particularity the existence of a vertical agreement.

2. The horizontal agreement

Because the government has failed to plead a vertical agreement to join the conspiracy by the trading houses, this case does not involve overt acts by co-conspirators occurring in the United States. The government contends, nonetheless, that the Sherman Act encompasses the wholly extraterritorial conduct described in the alleged horizontal agreement between Jujo and the other Japanese manufacturers of fax paper. This presents a question of first impression regarding the extraterritorial reach of the criminal provisions of the Sherman Act. See Restatement (Third) of Foreign Relations Law § 403, note 8 (1986) ("No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States.").[16]

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[16] The government cites two criminal cases as applying the Sherman Act to foreign conduct: United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957) and In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 313 (D.D.C. 1960). Both of these cases, however, specifically premise their

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nationals, is declared to be illegal.

15 U.S.C.A. § 1. This section serves as the substantive language for both civil and criminal application of the antitrust laws. According to the government this essentially ends the matter, for "it is well established that [the civil sanctions of] the Sherman Act appl[y] to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795 (1993). The court, however, disagrees with that suggested equating of the Sherman Act's civil and criminal application.

As a general matter, there is a strong presumption against extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). As noted above, courts have held that this presumption has been overcome in the case of civil application of the federal antitrust laws. Hartford, 509 U.S. at 795. Nonetheless, because the presumption carries even more weight when applied to criminal statutes, United States v. Bowman, 260

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holding on the fact that co-conspirators committed overt acts in the United States. Oldham, 152 F. Supp. at 821 ("the only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States"); Shipping Industry, 186 F. Supp. at 314 ("American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), does not preclude Sherman Act jurisdiction over agreements in restraint of trade carried out, at least in part, within the United States."). Indeed, Oldham makes "clear that there is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals." Oldham, 152 F. Supp. at 821.

U.S 94, 97-98 (1922), the line of cases permitting extraterritorial reach in civil actions is not controlling. And, indeed, commentators have generally recognized this distinction when explaining the extraterritorial reach of the antitrust laws:

> The principles governing [extraterritorial application of civil laws] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, the presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement (Third) of Foreign Relations Law § 403, cmt. f (1986).

Moreover, courts have recognized that the substantive language of section 1 of the Sherman Act requires different treatment in civil and criminal contexts. See e.g., United States v. United States Gypsum Co., 438 U.S. 422, 439-43 (1978) ("Gypsum"). In Gypsum, the Supreme Court confronted the issue of whether criminal responsibility under the Sherman Act should be based on strict liability, as it had been held in civil cases, or whether some intent element should be attributed to it as the traditional canons of statutory interpretation would suggest. Id. at 436. The Court reasoned that the ambiguities inherent in the fact intensive nature of an antitrust prosecution counseled against imposing criminal liability absent a demonstration of intent to violate the law. Id. at 440-42. Additionally, the Court recognized that Congress adopted the language of the Sherman Act "fully aware of the traditional distinction between the elements of civil and criminal offenses and

apparently did not intend to do away with them." Id. at 443 n.19.

Here, the court faces a choice between competing interpretative principles similar to the one posed in Gypsum. As did the Court in Gypsum, this court concludes that the traditional distinction between the elements of civil and criminal charges must be maintained.

This conclusion finds support in policies underlying antitrust and criminal law. On the civil side, antitrust enforcement benefits from a certain degree of interpretive flexibility. Appalachian Coals v. United States, 288 U.S. 344, 359-60 (1933). That flexibility enables the government to use the antitrust laws as an effective means for regulating business practices. Cr. Gypsum, 438 U.S. at 442. But, as Nippon observes, such flexibility is antithetical to the principles of predictability and fairness that undergird the criminal law. Id. at 441-42. See also 2 Areeda and Hovenkamp, Antitrust Law § 311 32-33 (rev. ed. 1995). And, because the Sherman Act is silent on the issue, imputation of extraterritorial application of its provisions would present serious questions about notice to foreign corporate defendants as to the criminality of its conduct. Cr. Balthazar v. Superior Court of the Commonwealth of Massachusetts, 428 F. Supp. 425, 433 (D. Mass. 1977) ("criminal liability should only attach to clearly delineated transgressions"), aff'd, 573 F.2d 698 (1st Cir. 1978).

In addition, the legislative history belies any suggestion that, in passing the Sherman Act, Congress believed that it was reaching wholly extraterritorial conduct. In response to concerns that potential antitrust violators could evade the proscriptions of the Sherman Act by forming their agreement outside the United States, Senator Sherman explained:

> It is true that if a crime is committed outside of the United States it can not be punished in the United States. But if an unlawful combination is made outside of the United States and in pursuance of it property is brought within the United States such property is subject to our laws. It may be seized. A civil remedy by attachment could be had. Any person interested in the United States could be made a party.
>
> Either a foreign or a native may escape "the criminal part of the law," as he says, by staying out of our jurisdiction, as very many do, but if they have property here it is subject to civil process. . . . . [A foreigner] may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here.

21 Cong. Rec. 2461, reprinted in Earl W. Kintner, ed., The Legislative History of Federal Antitrust Laws and Related Statutes, Part I, The Antitrust Laws, vol. 1. p. 126 (1978).

For all these reasons, the court concludes that the criminal provisions of the Sherman Act do not apply to conspiratorial conduct in which none of the overt acts of the conspiracy take place in the United States.

The indictment against Nippon and Jujo will be dismissed.[17]

An order will issue.

United States District Judge

---

[17] Because Jujo no longer exists, the court considers Nippon's motion for dismissal as made on behalf of both defendants named in Count I of the Indictment. Accordingly, dismissal of the indictment will enter as to both Nippon and Jujo.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	Criminal No.
vs.	)	95-10388 JLT
	)	
APPLETON PAPERS, INC.;	)	
JUJO PAPER CO., LTD.;	)	Violations:
NIPPON PAPER INDUSTRIES CO., LTD.;	)	15 U.S.C. § 1
HIRINORI ICHIDA; and	)	
JERRY A. WALLACE,	)	
	)	
Defendants.	)	

INDICTMENT

COUNT ONE
CONSPIRACY TO RESTRAIN TRADE
(15 U.S.C. § 1)

The Grand Jury charges:

3. JUJO PAPER CO., LTD., and NIPPON PAPER INDUSTRIES CO., LTD. are hereby indicted and made defendants on the charge stated below.

DESCRIPTION OF THE OFFENSE

4. Beginning at least as early as February 1990 and continuing at least until December 1990, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators entered into and engaged in a combination and conspiracy to increase prices of jumbo roll thermal facsimile

paper (hereinafter "fax paper") sold in the United States and Canada (hereinafter "North America"). The combination and conspiracy unreasonably restrained foreign and interstate trade and commerce in violation of Section One of the Sherman Act (15 U.S.C. § 1).

5. The charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial term of which was to increase prices of fax paper sold throughout North America.

DEFENDANTS AND CO-CONSPIRATORS

6. NIPPON PAPER INDUSTRIES, CO., LTD. ("NIPPON"), is a corporation organized and existing under the laws of Japan, and has its principal place of business in Tokyo, Japan. NIPPON has a satellite office located in Seattle, Washington. NIPPON was formed in 1993 when JUJO PAPER CO., LTD. ("JUJO") and Sanyo Kokusaku Co., Ltd., merged. During the period covered by this Count, JUJO manufactured fax paper and sold it for import into North America through trading houses in Japan and their United States subsidiaries. In 1990, JUJO sold approximately $6.1 million dollars of fax paper for import into North America.

7. Various individuals and corporations, not made defendants in this Indictment, participated as co-conspirators in the offense charged and performed acts and made statements to further it.

8. Whenever this Indictment refers to any act, deed, or transaction of any corporation, it means that the corporation engaged in the act, deed or transaction by or through its officers, directors, employees, agents, or other

representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

MEANS AND METHODS OF THE CONSPIRACY

9. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did the following things, among others:

(a) in February 1990, held meetings in Japan where they discussed increasing prices for fax paper to be sold in North America.

(b) in March 1990, held a meeting in Japan where they agreed to increase prices for fax paper to be sold in North America;

(c) raised their prices for fax paper to be imported into North America;

(d) directed their co-conspirator trading houses to implement price increases to fax paper customers in North America; and

(e) participated in telephone conversations and otherwise contacted each other to maintain continued adherence to their conspiratorial agreement.

TRADE AND COMMERCE

10. Fax paper is a type of specialty paper with a chemical coating that allows it to produce an image by a transfer of thermal energy from a print head. Fax paper manufacturers produce the paper in bulk rolls, which are commonly referred to as jumbo rolls. Jumbo rolls are approximately 40 to 50 inches in width and weigh up to 2,000 pounds.

Converters, the primary customers of fax paper, buy fax paper and cut the jumbo rolls down into smaller finished rolls that are suitable for use in fax paper machines, certain medical printing equipment, and other uses. In 1990 and 1991, total sales of fax paper in North America were approximately $100 million during each year.

11. During the period covered by this Count, to import their fax paper into North America, Japanese manufacturers typically sold their fax paper to unaffiliated trading houses in Japan. The Japanese manufacturers sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to the customers at specified prices. The Japanese manufacturers largely controlled the prices to be charged to specific North American customers, and monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged. Once the Japanese trading houses purchased the fax paper, they then shipped it to the United States for sale to their wholly owned U.S. subsidiaries ("U.S. trading houses"). The U.S. trading houses then either sent the fax paper shipments directly to customers throughout North America or transported the shipments to warehouse facilities for a short period of storage before being transported to the customers. The imported fax paper continued to bear the Japanese manufacturers' names throughout this process.

12. During the period covered by this Count, price notices and invoices, shipment reports, and billing documents, all of which were essential to the import of fax paper from Japan into the United States were transmitted between Japan and the United States by co-conspirator trading houses in a continuous and uninterrupted flow of foreign and interstate commerce.

13. During the period covered by this Count, the defendants and co-conspirators shipped, or caused to be shipped, in a continuous and uninterrupted flow of foreign and interstate commerce, substantial quantities of fax paper manufactured in Japan into the United States for sale to customers.

14. The business activities of the defendants and co-conspirators that are the subject of this Count were within the flow of, and substantially affected, foreign and interstate commerce, and had a direct, substantial and reasonably foreseeable effect on import and domestic commerce.

JURISDICTION AND VENUE

15. The conspiracy charged in Count One of this Indictment was carried out, in part, within the District of Massachusetts and within the five years preceding the return of this Indictment.

ALL IN VIOLATION OF TITLE 15 U.S.C. SECTION 1.

COUNT TWO
CONSPIRACY TO RESTRAIN TRADE
(15 U.S.C. § 1)

The Grand Jury further charges:

16. APPLETON PAPERS, INC., HIRINORI ICHIDA and JERRY A. WALLACE are hereby indicted and made defendants on the charge stated below.

17. Each and every allegation contained in paragraphs 5, 6 and 8 are here realleged with the same full force and effect as though said paragraphs were set forth in full detail.

DESCRIPTION OF THE OFFENSE

18. Beginning at least as early as July 1991 and continuing at least until February 1992, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators entered into and engaged in a combination and conspiracy to increase prices of jumbo roll thermal facsimile paper (hereinafter "fax paper") sold in the United States and Canada (hereinafter "North America"). The combination and conspiracy unreasonably restrained foreign and interstate trade and commerce in violation of Section One of the Sherman Act (15 U.S.C. § 1).

19. The charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial term of which was to increase prices of fax paper sold in North America.

DEFENDANTS AND CO-CONSPIRATORS

20. APPLETON PAPERS, INC. ("APPLETON"), is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Appleton, Wisconsin. APPLETON is a wholly owned subsidiary of Arjo Wiggins Appleton, PLC of London, England. During the period covered by this Count, APPLETON was a U.S. manufacturer engaged in the business of selling fax paper. In 1991, APPLETON sold approximately $45 million dollars of fax paper to customers in North America.

21. HIRINORI ICHIDA is a citizen and resident of Japan. During the period covered by this Count, he managed the Mitsubishi Paper Mils, Ltd. ("MPM") division responsible for imports of fax paper to North America. MPM is a

corporation organized and existing under the laws of Japan, and has its principal place of business in Tokyo, Japan. During the period covered by this Count, MPM manufactured fax paper in Japan and sold it for import into North America through a trading house, Mitsubishi Corporation ("MC") (a Japanese corporation located in Tokyo, Japan) and its subsidiary, Mitsubishi International Corporation ("MIC") (a U.S. corporation with its principal place of business located in New York, New York).

22. JERRY A. WALLACE ("WALLACE") is a United States citizen, residing in Appleton, Wisconsin. Prior to January 1991, WALLACE was the Director of APPLETON'S Thermal Business Unit which, among other things, was responsible for making pricing decisions for fax paper. In January 1991, he became APPLETON's Vice President of Research & Development. In that position, he remained involved in pricing decisions for fax paper during the period covered by this Count.

MEANS AND METHODS OF THE CONSPIRACY

23. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did the following things, among others:

(a) on July 10, 1991, WALLACE flew to Springfield, Massachusetts, to meet with Kazuhiko Watanabe ("Watanabe"), president of Kanzaki Specialty Papers ("KSP"), a U.S. manufacturer of fax paper, with its principal place of business located in Ware, Massachusetts. At the meeting, Watanabe proposed a price increase for fax paper sold in North America with KSP leading the increase. WALLACE agreed to support the increase and to inform others at APPLETON about their discussion;

(b) on July 29, 1991, Watanabe, ICHIDA and a certain other co-conspirators from MPM, MIC and New Oji Paper Co., Ltd., the parent company of KSP, met in KSP's offices in Tarrytown, New York and agreed to increase fax paper prices in North America;

(c) in July and August 1991, telephone calls were placed among the defendants and co-conspirators to confirm each firm's intentions to participate in the conspiracy and to confirm that the price increases would be implemented;

(d) in or about August 1991, announced price increases to fax paper customers in North America; and

(e) charged higher prices to fax paper customers in North American.

TRADE AND COMMERCE

24. During the period covered by this Count, the defendants and co-conspirators manufactured and/or sold fax paper throughout North America. The defendants and co-conspirators who manufactured fax paper did so in the United States or Japan. Fax paper manufactured in the United States was sold directly to customers in the U.S. Fax paper manufactured in Japan was imported through unaffiliated, co-conspirator Japanese trading houses and their U.S. subsidiaries. The trading houses buy, import and sell the fax paper to customers throughout North America.

25. During the period covered by this Count, the defendants and co-conspirators shipped, or caused to be shipped, in a continuous and uninterrupted flow of foreign and interstate commerce, substantial quantities of fax paper manufactured in Japan into the United States for sale to customers, and substantial quantities of fax paper

manufactured in Massachusetts and Wisconsin into other states for sale to customers.

26. The business activities of the defendants and co-conspirators that are the subject of this Count were within the flow of, and substantially affected, foreign and interstate commerce.

JURISDICTION AND VENUE

27. The conspiracy charged in Count Two of this Indictment was carried out, in part, within the District of Massachusetts and within the five years preceding the return of this Indictment.

ALL IN VIOLATION OF TITLE 15 U.S.C. SECTION 1.

A TRUE BILL

Dated:

_____
FOREPERSON

Anne K. Bingaman Assistant Attorney General	Lisa M. Phelan
Gary R. Spratling	Sheryl L. Robinson
J. Robert Kramer II	Reginald K. Tom
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Donald K. Stern
United States Attorney
District of Massachusetts

A TRUE BILL

FOREPERSON OF THE GRAND JURY

Assistant United States Attorney

DISTRICT OF MASSACHUSETTS

Returned into the District Court by the Grand Jurors and filed.

Deputy Clerk

APPENDIX D

PETITIONER'S LIST OF ALL PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Pursuant to Supreme Court Rule 29.6, Nippon Paper Industries Co., Ltd., hereby lists all of its nonwholly owned subsidiaries. Nippon has no parent companies.

JUJO PAPER BOARD CO., LTD.
Kayo Paper Art Co., Ltd.
Kakuai Paper Co., Ltd.
KANKO UNYU CO., LTD.
Tatsusiro Siko Co., Ltd.
SHINYO CO., LTD
STAKE PAPER MFG. CO., LTD.
A&E CO., LTD.
Iainomeki Carbonate Co., Ltd.
Natsuura Trading Co., Ltd.
Notoku Unyu Co., Ltd.
Kyokusin Transport Co., Ltd.
Akita Jujo Chemicals Co., Ltd.
Super Co., Ltd.
Fufutsu Futo Co., Ltd.
Shikoku Coco-Cola Bottling Co., Ltd.
Sakurai Co., Ltd.
Notoku Sangyo Co., Ltd.
San-Hic Chiyoda Corporation
NEW HOKKAI HOTEL CO., LTD.
BDI Co., Ltd.
NIPPON NEW ZEALAND TRADING CO. LTD.
Kushiro Jujo Packing Co., Ltd.
Shinfuji Niko Co., Ltd.
Fuji Kogyo Co., Ltd.
Hokuto Kogyo Co., Ltd.
VOLTERRA JAPAN LTD.

Nyoto JM Shika Co., Ltd.
Warununa Techno Clean Co., Ltd.
Iwaki Hokuzel Sangyo Co., Ltd.
Akita Jujo Ryokka Co., Ltd.
Hakoria Chip Kogyo Co., Ltd.
Kocho Co., Ltd.
Nissel Sangyo Co., Ltd.

Supreme Court, U.S.
FILED
JUL 17 1997
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(2)

No. 96-1987

In the Supreme Court of the United States

OCTOBER TERM, 1996

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1987

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing the indictment in this case for failure to state an offense under Section 1 of the Sherman Act, 15 U.S.C. 1.

1. On December 13, 1995, a federal grand jury sitting in the District of Massachusetts returned a two-count indictment charging that petitioner and its predecessor corporation conspired to increase the price of thermal facsimile ("fax") paper sold to customers in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 3a-4a. The indictment alleges that in 1990 petitioner and other fax paper manufacturers held a series of meetings in

Japan that resulted in an agreement to increase the price of fax paper sold in North America. *Ibid.* The indictment alleges that petitioner and the other manufacturers "directed their co-conspirator trading houses to implement price increases to fax paper customers in North America" (*id.* at 52a), and "monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged" (*id.* at 53a). The indictment also alleges that petitioner "sold approximately $6.1 million dollars of fax paper for import into North America" in 1990 (*id.* at 51a) and that petitioner's conduct "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce" (*id.* at 54a).

On September 3, 1996, the district court granted petitioner's motion to dismiss the indictment. Pet. App. 30a-49a. The district court found that the indictment lacked allegations of conspiratorial conduct within the United States. *Id.* at 42a-45a. The court also held that a criminal Sherman Act charge may not be based on conduct occurring wholly outside the United States. It rejected the government's reliance on *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 796 (1993), in which the Court deemed it "well established * * * that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," because *Hartford* involved a civil, not criminal, antitrust action. Pet. App. 45a-49a.

On March 17, 1997, the court of appeals reversed and remanded. Pet. App. 1a-29a. The court of appeals observed that the same substantive language of Section 1 of the Sherman Act governs both civil and criminal cases. *Id.* at 9a. The court thus concluded

that this Court's decision in *Hartford* is controlling here and required it to give Section 1 a comparable reach in a criminal prosecution. *Id.* at 19a.

2. Petitioner contends (Pet. 11-12) that the court of appeals erred by holding that Section 1 of the Sherman Act authorizes a criminal prosecution based on "wholly foreign conduct carried out by foreigners," and by applying this Court's construction of the Sherman Act in *Hartford* (a civil case) to this criminal prosecution.

The court of appeals' holding that Section 1 of the Sherman Act authorizes a criminal prosecution based on wholly extraterritorial conduct represents the first decision of an appellate court to address that issue. Review of that holding, which accords with the Court's construction of Section 1 in the civil context, is not warranted. In addition, whatever the merits of petitioner's contentions, they are not yet ripe for review by this Court. The decision of the court of appeals places petitioner in precisely the same position it would have occupied if the district court had denied its motion to dismiss. If petitioner is acquitted following a trial on the merits, its contentions will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed on appeal, it will then be able to present its contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of a final judgment against it. Accordingly, review by this Court of the decision of the court of appeals would be premature at this time.*

---

* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER DELLINGER
Acting Solicitor General

JULY 1997

No. 96-1987

Supreme Court, U.S.
FILED
JUL 17 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

NIPPON PAPER INDUSTRIES CO., LTD.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* THE GOVERNMENT OF JAPAN IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

1. Whether the First Circuit erred in concluding that Section One of the Sherman Act, in violation of well established international law, should be given extraterritorial criminal application to business conduct undertaken by foreign nationals entirely outside the United States.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Government of Japan has a substantial interest in this case because of the principles of international law and sovereignty that it implicates.[1] The focus of this case is the business activities of Japanese corporations within Japan. In accordance with international law, anticompetitive activities occurring within Japanese territory and committed by Japanese corporations fall within the scope of Japanese jurisdiction and are regulated by Japanese legislation. The criminal application of United States antitrust laws to such activities is invalid under well settled international law.

The Government of Japan has long pursued friendly relations with the United States through the bilateral and multilateral framework of cooperation. At the heart of bilateral negotiations and consultations between these nations is a fundamental mutual respect for each State's sovereignty.

An essential element of a State's sovereignty is the right to regulate conduct within its territory, subject only to such limitations as it may have agreed to with other governments or as otherwise provided by international law. Conflicting national policies or practices should be resolved through bilateral or multilateral consultations between the countries involved. One State's unilateral extraterritorial application of its national laws is not the appropriate means for resolving international differences.

The Government of Japan wishes to make clear that it takes

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1. Pursuant to Rule 37(6) of this Court, this Court is advised that this brief was prepared solely by the *amicus curiae* and its counsel, Marks & Murase, L.L.P. No party to this case authored this brief in whole or in part. No persons other than the *amicus curiae* made any monetary contribution in connection with the preparation of this brief.

no position with respect to the merits of the underlying issues in this case. However, the Government of Japan considers itself obligated to set forth its views to this Court with respect to the vital international law issues implicated in this case. Specifically, this *amicus curiae* brief will respectfully argue to this Court that well established international law precludes the criminal application of the Sherman Act to the wholly extraterritorial conduct at issue in this case.

The Government of Japan has received consent to file this *amicus curiae* brief from the Petitioner and Respondent on this petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

This instant petition for *certiorari* presents a case of first impression before this Court with respect to an issue with far-reaching international implications: Does Section One of the Sherman Act permit criminal actions against foreign nationals for acts that occur solely outside the United States? The District Court correctly determined that the Sherman Act does not so apply and dismissed the indictments at issue. However, the First Circuit reversed, reaching a statutory interpretation of Section One impermissibly inconsistent with international law. Specifically, the First Circuit failed to give the requisite weight to the international law implications of applying the criminal portion of the Act to wholly extraterritorial conduct.

It is the opinion of the Government of Japan that if the First Circuit's decision is allowed to stand, Section One of the Sherman Act will be applied in the criminal context in a manner inconsistent with well established international law. This will have profound implications for the sovereignty of Japan and for the customary relations between nations. Because of the international significance of this case, the Government of Japan

respectfully requests that this Court grant the pending petition for certiorari, and upon hearing this case, reverse the First Circuit decision as contrary to the intent of the Sherman Act as informed by well settled international law.

ARGUMENT

I.

THE SUPREME COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO DECIDE THE QUESTION OF FIRST IMPRESSION OF WHETHER THERE CAN BE CRIMINAL PROSECUTION UNDER SECTION ONE OF THE SHERMAN ACT FOR WHOLLY EXTRATERRITORIAL CONDUCT.

This case presents an important question hitherto unanswered by this Court: Can the Sherman Act be applied in the criminal context to wholly extraterritorial conduct notwithstanding well settled international law that severely restricts such application of criminal statutes? The First Circuit incorrectly held that a criminal prosecution may be predicated upon Section One of the Sherman Act for wholly extraterritorial conduct. In so holding, the First Circuit gave insufficient consideration to the application of international law to the proper reach of the Sherman Act. When international law is taken into account, as it must be, it is plain that the Sherman Act should not be interpreted to permit criminal prosecution based on wholly extraterritorial conduct.

A. It Is Well Settled That Acts Of Congress Such As The Sherman Act Should Be Interpreted So As To Conform To International Law.

It is a well established principle of statutory construction

that there is a presumption against interpreting a statute in a manner that would cause it to violate international law. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.' " *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia J., dissenting). It will be demonstrated below that a criminal application of Section One of the Sherman Act to the wholly extraterritorial conduct at issue in this case would violate international law. Accordingly, the Sherman Act should not be interpreted or applied to permit the reach of its criminal proscriptions to wholly extraterritorial conduct.

B. The First Circuit's Expansive Interpretation Of The Sherman Act Applying It Criminally To Wholly Extraterritorial Conduct Is Invalid Under International Law.

1. A Nation's Jurisdiction Within Its Borders Is Fundamental To Well Settled International Law.

It is a bedrock principle of international law that a sovereign nation is entitled to exercise jurisdiction, *prima facie* exclusive, over events and persons living within its territory (the "territorial principle"). This is particularly true in the context of criminal law, where the "territorial principle" is everywhere regarded as of primary importance and of fundamental character. *See* Ian Brownlie, *Principles of Public International Law*, 287, 300-03 (4th ed. 1990).

The "territorial principle" has long been recognized by courts and legal scholars. Thus, in the landmark case of *American*

Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), Justice Holmes' opinion for the Court stated: "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." 213 U.S. at 356 (citations omitted); *see also The S.S. Lotus*, P.C.I.J., Ser. A. No. 10 (1927) ("[T]he first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State."). It logically follows from the primacy of every State's authority on its own soil that no State can have authority within the borders of another. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens. . . . ") (citation omitted).

It is clear that international law limits the authority of a State to assert jurisdiction over matters within the sovereign jurisdiction of another. A commentator well summed up this principle:

> The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. *** The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states. . . .

I. Brownlie, *Principles of Public International Law*, 287.

Under international law, if a crime did not occur within the territory of the sovereign, there must be a sufficiently effective link between the crime and the State to overcome the presumption that criminal law is, *prima facie*, exclusively territorial in its reach. *See id.* at 306; *see also,* 1 *Oppenheim's International Law* 468 (9th ed. 1992) ("in the absence of any direct and substantial connection between the state exercising jurisdiction and the matter in relation to which jurisdiction is exercised, the exercise of jurisdiction would be a violation of international law.") (footnote omitted). As demonstrated below, no such effective link exists in this case.

2. International Law Restricts The Extraterritorial Reach Of Criminal Statutes Where "Substantial Foreign Elements" Are Present.

International law plainly restricts the extraterritorial reach of criminal laws where there is no direct and substantial link between a State claiming jurisdiction and the matter over which jurisdiction is to be exercised — in other words, where the elements of the transaction at issue are substantially foreign.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) (the "Restatement"), summarizes international law as derived from customary international law and from international agreements and is treated by United States courts as setting forth the central principles of international law. *See, e.g., Hartford Fire*, 509 U.S. at 799 (citing Restatement); *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) [of Foreign Relations Law] for the relevant principles of international law.").

For the instant case, the Restatement provides specific guidance with respect to the extraterritorial application of the criminal United States antitrust laws:

> The principles governing [jurisdiction to prescribe] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, *the presence of substantial foreign elements will ordinarily weigh against application of criminal law.* In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement § 403, cmt. f (emphasis added).

Reporters' Note 8 to Section 403 of the Restatement further sets forth the special concerns associated with the imposition of criminal sanctions on foreign conduct: "[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive." That Note further observes that "It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification." Importantly, the Note recognizes that this limit on the extraterritorial reach of criminal law applies with particular force with respect to economic crimes: "No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States." *Id.*[2]

2. Though Section 415 of the Restatement addresses the extraterritorial reach of antitrust laws, it, unlike the comments and notes to Section 403, does not address the distinction between the reach of criminal law as distinct from civil law. Furthermore, the concepts of "substantial effect" and "principal

(Cont'd)

International law will presume a sufficient connection between a State and a crime committed abroad only in the case of crimes with serious political and security significance, such as espionage and treason and internationally condemned crimes. *See* 1 *Oppenheim's International Law,* 469-71. In such cases, the State in whose territory the act occurs is not likely to object to regulation by the State concerned. *See* Restatement § 403, rep. n.8.[3]

In short, the extraterritorial reach of a nation's criminal laws with respect to the acts of foreign nationals on another country's soil, except in the most serious cases, is highly disfavored by well established international law.

3. Properly Interpreted Consistent With International Law, Section One Of The Sherman Act Should Not Be Applied On An Extraterritorial Basis In The Criminal Context To Conduct Wholly Outside The United States.

As set forth in Section A, it is well settled that United States

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(Cont'd)

purpose" set forth in Section 415 are too vague and subjective to be properly applied in the case of extraterritorial criminal jurisdiction. Accordingly, Section 403 should be principally relied upon in properly determining this distinction.

3. Under the so-called "universal principle," a nation has authority under international law to define and prescribe punishment for aliens within foreign territory for certain limited offenses recognized by the community of nations to be of universal concern, such as piracy, slave trade, hijacking, war crimes, etc. Restatement § 404. Similarly, the "protective principle" recognizes the right of a State to punish a limited class of offenses committed outside its territory by foreign nationals that are directly against the security of the state. *Id.* § 402, cmt. f. The antitrust laws do not concern the type of offenses these principles contemplate.

laws not otherwise certain on their face are to be interpreted in conformity with international law. In addition to this fundamental rule of statutory construction, there also exists a strong presumption in United States law against the extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Further consistent with international law, this presumption carries even more weight when applied to criminal statutes. *United States v. Bowman*, 260 U.S. 94, 97-98 (1922); *see also,* 1 *Oppenheim's International Law* 82.

The language and legislative history of Section One of the Sherman Act are unclear as to the Section's extraterritorial reach.[4] Therefore, a proper interpretation of the Act recognizes in the first instance that it is to be interpreted and applied so as to conform to, or to at least not offend, international law. *See Weinberger*, 456 U.S. at 32. Here, international law is clear: the presence of "substantial foreign elements" weighs heavily against the extraterritorial application of criminal antitrust law. As set forth more fully in the District Court opinion, 944 F. Supp. 55, the alleged conspiracy at issue involved solely Japanese nationals and corporations, and the contacts between these aliens in furtherance of the alleged conspiracy to fix prices occurred wholly outside of the United States, namely in Japan. The "foreign elements" could not be more "substantial."

Further, given the primacy of Japan's jurisdiction over alleged criminal acts occurring within its borders, criminal application of the United States antitrust laws to conduct by Japanese nationals committed wholly within Japan would be "particularly intrusive" to Japan's jurisdiction. *See* Restatement § 403 n. 8.

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4. Earl W. Kintner, 1 *Federal Antitrust Law* §§ 7.1 - 7.2 (Anderson 1980).

The fatal flaw in the First Circuit's decision was its failure to recognize that an extraterritorial application of the criminal aspect of the Sherman Act to the facts of this case was invalid under international law. The First Circuit also erred by giving short shrift to the strong presumption against the extraterritorial application of criminal laws. The First Circuit erroneously treated the civil and criminal aspects of the Sherman Act as if they had identical international law implications and were subject to an identical statutory interpretation.

As shown, the extraterritorial application of criminal laws gives rise to considerably greater sovereignty concerns than does such application of civil laws. *See* Restatement § 403, cmt f. and n. 8. Aside from crimes universally viewed as heinous, the extraterritorial application of criminal laws runs an especially significant risk of infringing upon the sovereign rights of a foreign nation.

First, a criminal prosecution, as distinct from a civil action, entails the right and ability to incarcerate an individual.[5] This authority is a grave one indeed, since it means the ability to remove the most precious of rights — freedom. The authority to undertake this most solemn duty is traditionally reserved to the State in which the offending acts took place or to the State of which the offender is a national. Here, neither is the case. Second, the extraterritorial application of criminal laws runs the considerable risk that foreign parties may not be able to foresee or predict that their conduct could expose them to criminal punishment abroad. *Cf. BMW of North America Inc. v. Gore*, 116 S. Ct. 1589, 1598 & n.22 (1996) (reaffirming principle that a person must receive fair notice of the conduct that will subject him to punishment).

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5. Indeed, for these reasons, international law provides clear guidelines for the extraterritorial enforcement of a State's criminal laws. *See* Restatement §§ 431-433.

Indeed, as one commentator has noted:

> [B]oth civil and criminal proceedings have a potential for encroaching upon the territorial sovereignty of the foreign state concerned, since both may involve the exercise of state authority; but this is more evident, and creates more serious problems, in relation to criminal cases where the involvement of the public authority of the prosecuting state is readily perceived as leading to the exercise of such authority by one state within the territory of another.

1 *Oppenheim's International Law* 466-67 (footnote omitted).

Given the unique and important concerns intrinsic to criminal law, it is not surprising that international law treats differently the extraterritorial application of criminal as distinct from civil laws. *See* Restatement, § 403, cmt. f and rep. n. 8; *see also* 1 *Oppenheim's International Law,* 466-68. Because the extraterritorial reach of the Sherman Act must be determined in accordance with international law, it follows that the proper statutory construction of the extraterritorial reach of the Sherman Act differs as between its civil and criminal contexts. *Cf. United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (holding that the standard dispensing with a *mens rea* requirement in civil antitrust cases did not apply in criminal prosecutions under the Sherman Act). Indeed, as Judge Lynch noted in his concurring opinion in the First Circuit, "New content is sometimes ascribed to statutory terms depending upon context." 109 F.3d 1, 10; *see also Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 847 (1997) (same).

Thus, while an extraterritorial application of the Sherman

Act in the civil context might, as a bare majority of this Court held in *Hartford Fire*, 509 U.S. 764, be proper, this is entirely distinct, as a matter of international law and statutory construction, from a determination that such an extraterritorial reach would be appropriate in the criminal context. Indeed, by casting aside this distinction, the First Circuit disregarded centuries of case law and other authority reaffirming a State's particular authority over criminal acts within its borders. By ignoring the important role that this fundamental tenet of international law has in this case, it impermissibly failed to apply the Sherman Act to conform with this most fundamental principle of international law.

Because the extraterritorial application of criminal law — with certain exceptions not at issue here — is highly disfavored in international law, a proper interpretation of Section One of the Sherman Act should preclude its extraterritorial reach in the criminal context where, as here, the conduct at issue was committed by foreign nationals and occurred wholly outside the United States.

C. The "Effects Doctrine" Does Not Justify Or Permit The Extraterritorial Application Of Criminal Prosecution Under The Sherman Act.

Lacking any other connection between the United States and the matter over which it seeks to assert jurisdiction, the United States Government asserts jurisdiction in this case based on the "effects doctrine." Yet, no court in the United States to our knowledge has ever based criminal jurisdiction of the Sherman Act with respect to a foreign national for acts occurring abroad on the sole basis that the acts had an effect in the United States. It is important to note that *Hartford Fire*, which may have found the "effects doctrine" sufficient in the civil context, was not a criminal case, cited no criminal cases, and did not

address at all the unique concerns that arise where a criminal statute is sought to be applied extraterritorially.

Importantly, for the reasons set forth in Section B, the "territorial principle" has special primacy with respect to a State's criminal punishment of its citizens for acts taking place within its borders. *See, e.g.*, R. LaFave & W. Scott, *Criminal Law* § 16 at p. 111 (1983) ("for the most part federal criminal law rests only upon the territorial basis of jurisdiction."). It is respectfully submitted that a State is not justified in imposing criminal penalties upon a foreign national for acts occurring within another nation's territory solely on the basis of the resulting "effects" upon the State. Rather, for valid jurisdiction to exist under international law, at least a part of the constituent elements of the crime must be committed within the State's borders or there must exist a case for the proper application of the "universal" or "protective" principles.

It should be noted that the "effects doctrine" has not been universally accepted as consistent with international law. As one international law commentator explained:

> The justification for such assertions of jurisdiction on the basis of an alleged "effects" principle of jurisdiction has not been generally accepted, and the matter is still one of controversy. The exercise of jurisdiction because of the effects of an act within the state may amount to no more than an "objective" application of the territorial principle of jurisdiction, but where the effects relied on are not a constituent part of the offense in question but are mere consequences or repercussions of the act done, the legitimate bounds of the territorial

> principle of jurisdiction are overstepped, particularly if the effects are only incidental and insubstantial: in this lies the danger of impropriety in resort to the effects principle as a basis for jurisdiction and the doubtful consistency of that principle with international law.

1 *Oppenheim's International Law,* 474-75 (footnotes omitted). It also should be noted that the "effects doctrine" has to our knowledge never been accepted as a legitimate basis for an extraterritorial reach of criminal punishments for economic offenses, aside from fraud. *See* Restatement, § 403, n. 8. Indeed, it cannot be accepted as such consistent with international law.

Because of the concerns unique to the application of criminal laws, they should not be given extraterritorial reach except, as permitted by the "universal" and "protective" principles, with respect to the most heinous of crimes which all civilized nations recognize rightly may be prohibited outside a State's borders. The mere "effects" upon a State resulting from alleged economic crimes are not sufficient under international law to justify an extraterritorial reach of one particular State's criminal laws.

D. Respect For Other Sovereign States Should Preclude An Extraterritorial Reach Of The Criminal Sherman Act In This Case.

The fact that under *Hartford Fire* the United States and its citizens may attempt to reach out and seek civil legal relief against a foreign national for acts occurring abroad militates against, not in favor of, the extension of this doctrine to the criminal sphere. Considerations of international "comity," or the respect sovereign nations afford each other by limiting the reach

of their laws, should limit the further extraterritorial reach of United States antitrust law. *See Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-15 (9th Cir. 1976).

Hartford Fire purportedly affords the United States and its nationals a vehicle to pursue civil legal redress in connection with alleged antitrust violations emanating from abroad and from foreign nationals. In the opinion of the Government of Japan it would be unnecessary and an affront to the sovereignty of foreign nations for the United States also to take upon itself the authority to punish foreign nationals for alleged anticompetitive acts abroad in the criminal context as well. *See* 1 *Oppenheim's International Law*, 476 ("There comes a point . . . at which the application of a state's criminal law to the activities of foreigners in a foreign state involves an infringement of the territorial sovereignty and jurisdiction of the foreign state to which it may properly object.").

While the Government of Japan reserves the right to differ on the appropriateness of the "effects doctrine" in the civil context, it should be noted that the interests of the United States apparently can be adequately served by the extraterritorial reach that it has asserted in the antitrust civil context. *See Hartford Fire*, 509 U.S. 764. A further reach across international boundaries — this time with the authority to criminally punish — would violate international norms and would be contrary to the international restraint urged by this Court's sound reasoning from the beginnings of its jurisprudence.

II.

INTERNATIONAL COOPERATION IN A GLOBAL ECONOMY REQUIRES AN INCREASED RESPECT FOR TERRITORIAL SOVEREIGNTY.

One result of our globalized economy is that civilized nations are faced with similar problems in the field of competition policy. They are therefore obliged to adopt very similar legal norms which prohibit certain anti-competitive conduct. Accordingly, conduct that is prohibited in one State will more often than not be prohibited in another. The foregoing diminishes the need for the extraterritorial application of jurisdiction over crimes committed abroad by foreign nationals.

Furthermore, if a State is permitted to claim extraterritorial jurisdiction over a crime committed entirely abroad, the potential world-wide reach of that nation's criminal laws would be boundless. It is the opinion of the Government of Japan that that state of affairs would create disorder in the legal system governing the international relations among nations. The impact at this time of an extraterritorial extension of a criminal antitrust law would be particularly great because of the growing interdependence among citizens and corporations across the globe.

To avoid a profound disruption of international relations, it is the opinion of the Government of Japan that the "territorial principle" should be closely adhered to as the primary basis for punishing criminal economic conduct. In circumstances where the foregoing may not be sufficient, States should enter into appropriate bilateral or multilateral arrangements for mutual cooperation. For instance, if a State learns of criminal conduct committed by foreign nationals abroad that have certain effects within that State, that State should request the foreign State to

take appropriate action, rather than unilaterally applying its own domestic law abroad.

In short, affording primacy to the "territorial principle" with respect to the reach of criminal statutes would promote security and certainty in international life and will lessen friction among States. This, combined with international cooperation, will ensure the effective international enforcement of laws.

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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No. 96-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NIPPON PAPER INDUSTRIES CO., LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR THE PETITIONER

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. 96-1987

Nippon Paper Industries Co., Ltd.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

This case raises serious issues of federal law that present compelling reasons for prompt review by this Court. Without any textual support, the First Circuit's unprecedented opinion defines the criminal scope of the Sherman Act so broadly that it impinges upon the sovereignty of, and invites retaliation against American companies from, important United States trading partners.[1] The decision also conflicts

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[1] Petitioner respectfully refers the Court to The Brief of Amicus Curiae the Government of Japan, in support of this petition (filed July 17, 1997).

with important, long-standing precedents of this Court -- *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) -- and misapplies this Court's more recent decisions in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), and *Ratzlaf v. United States*, 501 U.S. 135 (1994). The decision denies due process by forcing petitioner to stand trial for conduct that it could not reasonably foresee would give rise to United States criminal penalties, and permits the Justice Department to expand the scope of a criminal statute on the books for 107 years merely by issuing a policy statement. Moreover, the First Circuit's opinion casually sweeps away the historical distinction between criminal and civil interpretive rules that has been fundamental in adapting the Sherman Act to meet 107 years of changing business practices.

The government's response to these important federal issues is to ignore them. The government argues that the petition should be denied, not because it claims the issues the petition raises lack importance but because the underlying order is "interlocutory" and because there is no circuit split. While these arguments might have merit in other circumstances, they are inapplicable here, and therefore should be accorded no weight.

1. As a threshold matter, the government's use of the term "interlocutory" is inapposite and misleading; clearly the government does not mean that this case involves a non-final, non-appealable order within the meaning of 28 U.S.C.

§ 1291 (1994).[2] The district court's dismissal of the indictment was appealable to the First Circuit and this Court without doubt has the authority to review the First Circuit's decision. Though the government uses confusing terminology, it does not claim otherwise.

2. When the dust settles, the government appears to be arguing that this case, although final for purposes of review by this Court, is tantamount to an "interlocutory order" under § 1291 because the First Circuit's reversal of the district court clears the way for a trial that could obviate the need for Court review altogether, or could allow petitioner to file a post-trial petition. In essence, the government asks this Court to refuse to review a petition that presents serious federal issues simply because there has been no acquittal or conviction of the defendant.

That proposition cannot withstand scrutiny. Over a century of the Court's practice is to the contrary; certiorari has been granted frequently in the very circumstances presented here. Each such case would have been subject to the same objections the government advances in its opposition -- that petitioner might moot the issue by prevailing at trial or, if not, could present all issues in a single post-trial petition. *See, e.g., Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (reviewing the court of appeals' reinstatement of an indictment in the face of alleged

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[2] 28 U.S.C. § 1291 states: "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

errors in grand jury proceedings); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (reviewing court of appeal's reinstatement of indictment charging petitioner with violating an environmental regulation); *Witte v. United States*, 515 U.S. 389 (1995) (reviewing court of appeal's rejection of petitioner's double jeopardy claims in reinstatement of indictment); *Wayte v. United States*, 470 U.S. 598 (1985) (reviewing rejection of petitioner's selective prosecution claims in reinstatement of indictment); *Serfass v. United States*, 420 U.S. 377 (1975) (reviewing court of appeal's rejection of conscientious objection and prejudice claims in reinstatement of indictment).

3. Moreover, in entertaining petitions where there has been no final adjudication on the merits, the Court has fashioned a distinction between those cases that raise issues collateral to the merits (such as jurisdictional challenges), where immediate review is generally allowed, and challenges that involve issues implicating the guilt or innocence of the petitioner, which warrant deferral until after a trial. That distinction counsels for immediate review here.

For instance, in both *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949), the "Supreme Court consented to review decisions raising important jurisdictional questions where the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial." Robert L. Stern, et al., Supreme Court Practice § 4.18, at 196-97 (7th ed. 1993). Similarly, in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938), the Court granted certiorari to review the affirmance

of a preliminary injunction where "there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion." *See also FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 466 (1984) (dismissal on jurisdictional grounds reversed and the Court "granted certiorari, to decide whether the District Court could exercise jurisdiction over [petitioner's] ultra vires claim"); *Cory v. White*, 457 U.S. 85, 88 (1982) (dismissal for lack of subject matter jurisdiction reversed and the Court granted certiorari "because of the troubling issues involving federal-court jurisdiction in [interpleader] disputes").

These cases are indistinguishable from this one. Nippon's petition raises no issue bearing on whether the company engaged in the conduct charged; the sole issue presented is whether Congress intended to permit the Executive Branch to bring criminal charges against foreign actors when the alleged conduct is wholly foreign.

4. There is another line of cases that also supports immediate review in this case: the Court's grants of certiorari in cases involving the "collateral-order" exception to 28 U.S.C. § 1291. While, as emphasized, the order in this case is "final" for purposes of appeal to this Court, unlike a collateral order which is subject to review only under an exception to the final judgment rule, the Court's analysis in such cases provides another basis to grant certiorari. In the two seminal cases involving the collateral-order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Abney v. United States*, 431 U.S. 651

(1977), the Court looked to three criteria to determine whether an order was immediately appealable.

First, the Court considered whether the disposition below constituted final rejection of the petitioners' claims or whether it was merely a step toward final judgment, warranting postponement of review until after trial. In both *Cohen* and *Abney*, the Court concluded that immediate review was appropriate because "there [were] simply no further steps that [could] be taken in the District Court to avoid the [action] the defendant maintains is barred . . . ." *Abney*, 431 U.S. at 656.

Second, the Court considered whether the claim was collateral to the issue to be resolved on the merits such that there was no justification for postponement of review. In both cases, the issues were found to be severable because the claim was "not an ingredient of the cause of action and [did] not require consideration with it." *Cohen*, 337 U.S. at 546-47. Rather, petitioner was "contesting the very authority of the Government to hale him into court to face trial on the charge against him," *Abney*, 431 U.S. at 659.

Finally, the Court asked whether the rights of the petitioners would be "significantly undermined," *Abney*, 431 U.S. at 660, if appellate review were postponed due in part to the fact that they would be subjected to the burdens of trial.

These criteria easily are met here. As in the collateral order cases, the First Circuit's decision that the Sherman Act extends to alleged wholly foreign conduct solely by foreign actors clears the way for a trial on the merits. Moreover,

petitioner is challenging the "very authority of the Government to hale him into court." *Abney*, 431 U.S. at 660. The issues presented by this petition are totally independent of, and can be decided without any development of, the underlying facts. Finally, denying review would "significantly undermine" petitioner's rights because it would expose the company to a trial that may very well be unjustified in the first instance, as the district court held. *Id.* at 660. Clearly, the procedural posture of this case should not preclude Supreme Court review of the important substantive issues raised by this petition.

5. The Court's willingness to entertain petitions involving claims of immunity also undermines the government's bid to delay scrutiny of its unprecedented application of the Sherman Act. Immunity claims, like Nippon's claim here, challenge the authority of a court to adjudicate the underlying case. As with jurisdictional challenges, the Court has often granted certiorari in immunity cases because immunity is an entitlement not to face trial -- a right that obviously is lost if review is delayed until after trial. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

A challenge to the extraterritorial application of the Sherman Act likewise implicates the authority of the government to bring petitioner to trial. If, as Nippon contends and the district court found, the law does not apply to foreign conduct, then an important right -- the right not to

stand trial in the absence of a statute making the alleged conduct criminal -- is lost by delaying review.

6. The absence of a circuit split also does not counsel against review. An essential component of petitioner's claim is that the government took a radical step when it indicted a foreigner for alleged wholly foreign criminal conduct. The indictment has no precedent anywhere in the Sherman Act's history. In such circumstances there cannot, by definition, be a circuit split. Moreover, there is good reason to believe that a split may never develop. As this Court has recognized, the government can shop for favorable jurisdictions. *See Parr v. United States*, 351 U.S. 513, 523 (1956) (Warren, C.J., dissenting) ("the Government can and probably frequently does shop around to find a court it deems most favorable to try defendants" and noting that for 20 years, the Government tried tax-evasion cases in one jurisdiction only to switch to another after an adverse court ruling). The government has virtually unlimited power to select its forum of choice in Sherman Act prosecutions of alleged offenses by foreign corporations outside the United States that allegedly had effects here.[3] The First Circuit's

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[3] So long as service can be effected anywhere in the United States and the defendant has minimum contacts with the United States as a whole and the exercise of jurisdiction is reasonable, virtually any district court will be able to exercise personal criminal jurisdiction over the defendant. *See* Fed. R. Civ. P. 4(d)(2) (permitting nationwide service of a criminal summons). The venue requirements could also be met through the "continuing offense" doctrine, 18 U.S.C. § 3237, which permits

unprecedented decision may thus, as a practical matter, become the law of the land. If the Sherman Act's criminal provisions are going to be interpreted as reaching wholly foreign conduct, thus infringing upon the sovereignty of other nations, it should be the Supreme Court, not the First Circuit, that determines whether this was truly Congress' intent.

7. The absence of a circuit split pales in importance where, as here, a "United States Court of Appeals has decided an important federal question . . . in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Such is the case here. The First Circuit's decision conflicts with at least two Supreme Court precedents. The first is *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), in which Justice Holmes wrote that Section One of the Sherman Act did not cover actions that took place entirely in a foreign country, even when those actions were undertaken by subsidiaries of American companies. Justice Holmes reasoned that entirely foreign conduct "obviously" could not be criminalized under the Sherman Act and could therefore not be subject to treble damages in a civil action. While *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) suggests that wholly foreign conduct can be the subject of civil proceedings, no decision by this Court has ever overruled *American Banana* with regard to the applicability of criminal sanctions to such conduct. The First Circuit decision, in effect, takes that step -- a decision

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prosecution in any of the districts in which the offense was begun, continued or completed.

only this Court can make. *See Augustini v. Felton*, No. 96-552, ____ U.S. ____ (June 23, 1997).

The First Circuit decision is equally at odds with *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), where the Court rejected the notion that long-standing civil precedents *ipso facto* govern parallel criminal applications of the Sherman Act. The First Circuit's holding that it was bound by *Hartford Fire* (a civil case) in ruling on the scope of the Sherman Act in this criminal case is contrary to *Gypsum* and to an age-old tradition of interpreting the Sherman Act differently in civil and criminal cases.

CONCLUSION

The government fails to advance a valid reason to forestall review of the First Circuit's wholesale restructuring of the Sherman Act. For the reasons stated in Nippon's Petition for Writ of Certiorari, the petition should be granted.

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No. 96-1987

In the Supreme Court of the United States

OCTOBER TERM, 1997

NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that this Court's construction in *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764 (1993), of the jurisdictional reach of Section 1 of the Sherman Act, 15 U.S.C. 1, controls in a criminal case charging a violation of that statute.

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NIPPON PAPER INDUSTRIES CO., LTD., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 109 F.3d 1. The opinion and order of the district court (Pet. App. 30a-49a) are reported at 944 F. Supp. 55.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1997. The petition for a writ of certiorari was filed on June 13, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 13, 1995, a grand jury sitting in the District of Massachusetts returned a two-count in-

dictment charging that petitioner conspired with others to increase the price of thermal facsimile (fax) paper sold to customers in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court granted petitioner's motion to dismiss the indictment on the ground that it failed to allege a violation of the Sherman Act. The court of appeals reversed. Pet. App. 1a-24a.

1. The indictment charges that during meetings held in Japan in early 1990, petitioner and other fax paper manufacturers "agreed to increase prices for fax paper to be sold in North America." Pet. App. 52a. To effectuate the conspiracy, the manufacturers sold the fax paper in Japan to co-conspirator unaffiliated trading houses that operated both in Japan and in the United States and arranged for shipment and sale to ultimate customers located in the United States. *Id.* at 52a-53a. The manufacturers, including petitioner, "sold discrete quantities of fax paper to the trading houses in Japan, for specific customers in North America, on condition that such quantities be sold to the customers at specified prices," "directed their co-conspirator trading houses to implement price increases to fax paper customers in North America," and "monitored the trading houses' transactions with the North American customers to ensure that the agreed upon prices were charged." *Ibid.* The indictment also alleges that in 1990 petitioner "sold approximately $6.1 million dollars of fax paper for import into North America," and that petitioner's conduct "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce." *Id.* at 51a, 54a.

2. On September 3, 1996, the district court granted petitioner's motion to dismiss the indictment. Pet.

App. 30a-49a. The district court concluded that the indictment lacked allegations of conspiratorial conduct within the United States. *Id.* at 42a-45a. The court also held that a criminal charge under the Sherman Act may not be based on conduct occurring wholly outside the United States. *Id.* at 45a-49a. It rejected the government's reliance on *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764, 796 (1993), in which the Court deemed it "well established * * * that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," because *Hartford* involved a civil, not criminal, antitrust action. Pet. App. 46a.

3. The court of appeals reversed. Pet. App. 1a-29a. It declined to address whether the indictment alleges conspiratorial conduct within the United States. *Id.* at 5a n.2. Rather, the court held that this Court's decision in *Hartford* governs the jurisdictional reach of the Sherman Act in a criminal case. *Id.* at 19a.[1]

The court observed that "in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute." Pet. App. 9a. That language provides that "[e]very contract, combination

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[1] The court of appeals also did not address (Pet. App. 8a) the government's alternative contention that the Sherman Act applies to wholly foreign conduct by virtue of a 1982 amendment to the Act. See 15 U.S.C. 6a (applying the Act to foreign conduct, including wholly extraterritorial conduct, as long as the conduct "has a direct, substantial, and reasonably foreseeable effect" on United States domestic or import commerce); see also H.R. Rep. No. 686, 97th Cong., 2d Sess. 10 (1982) ("wholly foreign transactions * * * are covered by" Section 6a); *Hartford*, 509 U.S. at 796-797 n.23.

in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * with foreign nations, is declared to be illegal." 15 U.S.C. 1. The court therefore reasoned that "common sense" and "fundamental interpretive principle[s]" (Pet. App. 9a) support construing Section 1 the same way, whether the underlying litigation is civil or criminal. *Id.* at 9a-11a. The court also explained that "[t]he words of Section One have not changed since the *Hartford Fire* Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding." *Id.* at 12a.[2] Accordingly, the court reversed the order of the district court and reinstated the indictment. *Id.* at 19a.

ARGUMENT

Petitioner challenges the court of appeals' holding that "the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States," regardless of whether it is applied in a civil or criminal case. Pet. App. 19a. The court of appeals' holding represents the first decision of an appellate court to address that issue.

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[2] The court also rejected petitioner's reliance on international comity on the grounds that a stronger comity argument had been rejected in *Hartford* and that price-fixing is illegal in both Japan and the United States. Pet. App. 17a-18a. In a concurring opinion, Judge Lynch also expressed the view that the indictment comported with international comity principles. *Id.* at 19a-29a. Although petitioner alludes to "explosive implications of the First Circuit decision for relations with foreign states," Pet. 5, 12, petitioner does not challenge the court of appeals' comity holding in this Court.

1. Section 1 of the Sherman Act prohibits conspiracies in unreasonable restraint of "trade or commerce * * * with foreign nations." 15 U.S.C. 1. In *Hartford Fire Insurance Company* v. *California*, 509 U.S. 764, 796 (1993), this Court held that this statutory language embraces "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[3] In reaching that conclusion, the Court in *Hartford*, 509 U.S. at 796-797 & nn. 22, 24, cited with approval Judge Hand's decision in *United States* v. *Aluminum Co. of America* (*Alcoa*), 148 F.2d 416 (2d Cir. 1945), which held that foreign corporations are liable for conspiratorial conduct undertaken wholly abroad that had substantial and intended effects within the United States. *Id.* at 443-444.[4]

Contrary to petitioner's contention (Pet. 16-19), the fact that *Hartford* arose in a civil proceeding does not detract from the conclusion that the jurisdictional reach of the Sherman Act is the same in civil and

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[3] Petitioner argues (Pet. 20-21) that *Hartford* did not involve wholly foreign conduct and, in any event, that the parties there conceded jurisdiction. As the court below correctly recognized (Pet. App. 8a, n.3), however, several of the claims in *Hartford* alleged conspiracies involving conduct solely by foreign companies that occurred outside of the United States. *Hartford*, 509 U.S. at 776, 795. Moreover, at least one foreign defendant contested jurisdiction. Pet. App. 8a n.3 (citing 509 U.S. at 795 n.21).

[4] The indictment in this case easily meets the jurisdictional test under *Hartford* and *Alcoa*. The indictment charges that petitioner conspired in Japan with the specific purpose of raising prices within the United States, Pet. App. 50a-54a, and that the conspiracy "had a direct, substantial and reasonably foreseeable effect on import and domestic commerce," *id.* at 54a.

criminal cases. Section 1 defines the jurisdictional reach of the Act for both civil and criminal offenses. 15 U.S.C. 1. The court below therefore properly "interpret[ed] the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil." Pet. App. 9a.

The court's conclusion is fully supported by this Court's precedents. In *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), this Court reaffirmed the principle that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." In construing the meaning of the word "willfully" in 31 U.S.C. 5322(a) (1988), the Court in *Ratzlaf* found "even stronger cause to construe a *single* [statutory term] the same way each time it is called into play." 510 U.S. at 143. Similarly, in *United States* v. *Thompson/Center Arms Company*, 504 U.S. 505 (1992), a plurality of the Court applied the rule of lenity when construing a statute with criminal applications, 26 U.S.C. 5849, in a civil proceeding. The plurality rejected the dissent's contention that particular statutory language could have different meanings depending on whether the court construed that language in a civil or criminal case. *Id.* at 518-519 n.10 (plurality opinion).[5] Thus, both *Ratzlaf* and *Thompson/Center* support the court of appeals' holding that *Hartford*'s construction of Section 1 of the Sherman Act controls in a criminal case.

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[5] In *Thompson/Center*, Justices Scalia and Thomas joined the plurality's application of the rule of lenity in a civil case to a statute with criminal application. 504 U.S. at 519 (Scalia, J., concurring in the judgment).

Indeed, petitioner's construction of the Sherman Act would produce results that Congress could not have intended. If petitioner's interpretation of the Sherman Act were correct, petitioner would be subject here to a civil suit seeking treble damages for injuries suffered by the government or a third party, but would be immune from criminal prosecution based on the same statutory violation. Moreover, under petitioner's reading of the Act, the government may not prosecute conspirators operating abroad who intend to, and succeed in, fixing prices within the United States, unless a co-conspirator undertook an overt act within the United States. Those distinctions find no support in the Sherman Act's text or purpose to protect against anticompetitive behavior.

2. There is also no merit to petitioner's argument (Reply Br. 9-10) that the decision below conflicts with *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), and *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). Although *American Banana* held that the Sherman Act did not reach the foreign conduct alleged in that case, 213 U.S. at 356-357, *American Banana* did not involve conduct alleged to cause substantial and intended effects in the United States. As this Court observed in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288 (1952), "the holding in [*American Banana*] was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive." Indeed, in *Strassheim* v. *Daily*, 221 U.S. 280 (1911), Justice Holmes, who also wrote the Court's opinion in *American Banana*,

cited *American Banana* for the proposition that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect." 221 U.S. at 285. In any event, to the extent petitioner reads (reply Br. 9) *American Banana*, a civil case, to hold that the Sherman Act does not apply to wholly foreign conduct with effects in the United States, that reading is flatly refuted by this Court's decision in *Hartford*. See Pet. App. 7a.[6]

The decision below is also in accord with this Court's decision in *Gypsum*. Contrary to petitioner's contention (Reply Br. 10), *Gypsum* neither applied nor established an "age-old tradition of interpreting the Sherman Act differently in civil and criminal cases." Rather, the Court in *Gypsum* construed Section 1 of the Act when applied in criminal cases to contain an element of *mens rea*, notwithstanding Congress's silence on the issue. 438 U.S. at 437; see also *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (discussing *Gypsum*). That settled maxim of interpretation, see *Morissette* v. *United States*, 342 U.S. 246, 263 (1952), however, does not support construing the Act's *express* jurisdictional reach differently in civil and criminal actions. See Pet. App. 15a ("[t]here is simply no comparable tradition or rationale for

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[6] To the extent *American Banana is* relevant, it supports the conclusion that the territorial reach of the Sherman Act is the same in both civil and criminal cases. See 213 U.S. at 357 (explaining that the Act's territorial reach is the same in civil and criminal cases because "the law begins by making criminal the acts for which it gives the right to sue").

drawing a criminal/civil distinction with regard to extraterritoriality").[7]

3. Petitioner and the government of Japan also contend (Pet. 14-19, Amicus Brief 9) that the court of appeals' decision conflicts with the principle that criminal statutes should be narrowly construed and the presumption against the extraterritorial application of statutes, see *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 250 (1991). Those contentions, however, presuppose an ambiguity that does not exist. This Court declared in *Hartford*—notwithstanding the general presumption against extraterritoriality in the face of statutory ambiguity—that Section 1 reaches foreign conduct that causes substantial and intended effects within the United States. Thus, the court below (Pet. App. 17a) correctly concluded that *Hartford* "foreclosed [it] from trying to tease an ambiguity out of Section One relative to its extraterritorial application."

Petitioner and the government of Japan similarly rely (Pet. 15-17; Amicus Br. 6-11) on comment f to Section 403 of the Restatement (Third) of Foreign Relations Law (1987), which states that extraterritorial application of the antitrust laws "should be found only on the basis of express statement or clear implication." The court of appeals correctly recognized (Pet. App. 16a), however, that the Restatement's comment merely restates the usual presumption

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[7] Indeed, the Court in *Gypsum* employed the background rule of requiring a *mens rea* in criminal cases precisely because the Court recognized that Section 1 otherwise has a single meaning applicable in both civil and criminal cases. See *Gypsum*, 438 U.S. at 438-439 (observing that under *Nash* v. *United States*, 229 U.S. 373 (1913), the rule of reason under Section 1 governs in criminal actions).

against extraterritoriality and does not dictate any rule of international law that compels a different interpretation of jurisdictional language depending on whether a court is interpreting that language in a civil or criminal case.[8]

Moreover, contrary to the government of Japan's assertion (Amicus Br. 4-5), the First Circuit's decision fully comports with principles of international law. It is well settled that a government may impose civil or criminal sanctions for foreign conduct that is intended to cause and actually causes substantial effects within its territory. 1 Charles C. Hyde, *International Law* § 238, at 798 (2d ed. 1945). That principle was firmly established at the time of the Sherman Act's adoption. See U.S. Department of State, *Report on Extraterritorial Crime and The Cutting Case* 23-24 (1887); accord 2 John B. Moore, *A Digest of International Law* § 202, at 244 (1906) ("The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable in the place where the evil is done, is recognized in the criminal jurisprudence of all countries."). Moreover, that principle long has been accepted by this Court, see *e.g.*, *Strassheim*, 221 U.S. at 285 (Holmes, J.), and is embedded in the "substantial and intended effects" test of *Alcoa* and *Hartford*. Accordingly, international law does not support petitioner's contention that the Sherman Act's

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[8] Japan's reliance (Amicus Br. 9) on *United States* v. *Bowman*, 260 U.S. 94 (1922), is similarly misplaced. As the court of appeals observed (Pet. App. 14a), *Bowman* "merely restate[s] the presumption against extraterritoriality previously established in civil cases like *American Banana* * * * [and] nowhere suggest[s] that a different, more resilient presumption arises in criminal cases."

jurisdictional reach should differ in criminal and civil cases. See also Pet. App. 23a-28a (Lynch, J., concurring).

4. Petitioner also errs in suggesting (Pet. 13, 24-30) that by applying *Hartford* in a criminal case, the decision below will impair the flexible application of the Sherman Act in civil cases.

Petitioner's contention is based on the assumption (Pet. 24) that courts will narrowly construe the Sherman Act's standard of conduct in civil cases to avoid creating an ambiguous standard that might later apply in criminal cases. That concern is unfounded. This Court already has rejected the contention that the Sherman Act imposes an ambiguous standard of conduct in criminal cases. See *Nash* v. *United States*, 229 U.S. 373, 376-378 (1913) (rejecting the contention that application of rule of reason in criminal cases is void for vagueness); *Gorin* v. *United States*, 312 U.S. 19, 27 n.13 (1941) (describing Section One as an "[a]dequately definite criminal statute[]"); *Gypsum*, 438 U.S. at 438-439 & 446-447 n.22 (approving the criminal prosecution of certain information exchanges held covered by Section One in prior civil cases); see also *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 557-558 (1944) (refusing to "freeze the proscription of the Sherman Act within the mold of [pre-1890] judicial decisions defining the commerce power" and explaining, "[t]hat Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt").[9]

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[9] In any event, the government generally restricts its criminal enforcement of the Sherman Act to *per se* violations of the

5. Petitioner additionally argues (Pet. 19-23) that the First Circuit's decision infringes on rights protected by the Due Process Clause of the Fifth Amendment because petitioner lacked reasonable notice that the Sherman Act criminalizes foreign conduct. That argument, however, was not raised or decided below and, consequently, is not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). In any event, petitioner's contention is without merit. This Court did not hesitate in *Hartford* to declare it "well established" that Section 1 of the Sherman Act reaches such conduct. 509 U.S. at 796 (citing *inter alia*, *Alcoa*, 148 F.2d at 444). Although petitioner argues (Pet. 19-20) that it "had no reason to believe" that *Alcoa*'s construction of Section 1 might govern in a criminal case, petitioner can point to no principle of statutory construction that permits the language of Section 1 to yield a narrower jurisdictional reach in a criminal than in a civil case. *Alcoa* thus provided petitioner ample notice that a court, when confronted with the issue, would hold that Section 1 criminalizes foreign conduct with substantial and intended effects in the United States.[10]

Act. See U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* 2 (Apr. 1995).

[10] Petitioner is thus in the same position as respondents in *Gypsum*, who argued that "principles of fair notice embodied in the Due Process Clause" precluded the government's criminal prosecution under the Sherman Act of "a mere exchange of information which had a stabilizing effect on prices * * * regardless of the purposes for the exchange," because no case had previously so recognized. *Gypsum*, 438 U.S. at 446-447 n.22. This Court, however, rejected that "lack of notice," because the same type of conduct had been held to be illegal in a

6. Finally, contrary to petitioner's suggestion (Reply Br. 4-8), review at this time will not necessarily obviate a trial on the merits. The district court, in a holding that the court of appeals declined to address (Pet. App. 5a, n.2), construed the indictment in this case not to allege conspiratorial conduct in the United States. *Id.* at 42a-45a. The district court's conclusion, however, is inconsistent with the plain language of the indictment, which charges that the trading houses, which were "co-conspirator[s]" in petitioner's horizontal price-fixing scheme, brought the fax paper into the United States from Japan for sale. *Id.* at 52a. The indictment similarly alleges numerous acts taken by the co-conspirator trading houses in this country to further their scheme. *Id.* at 52a-54a.

Because the allegations in the indictment clearly allege co-conspirator conduct in the United States, the district court has jurisdiction in this case on that ground. See *United States* v. *Pacific & Arctic Ry.*, 228 U.S. 87, 106 (1913); *Ford* v. *United States*, 273 U.S. 593, 619-624 (1927). Thus, further proceedings in the district court are likely to be required regardless whether the decision below was correctly decided. Accordingly, there is no reason to review the decision of the court of appeals at this time. Should petitioner ultimately be convicted, it can present its current claim, along with any other claims it may have, to this Court in a petition for a writ of certiorari seeking review of the final judgment against it.

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civil case. *Gypsum*, 438 U.S. at 447 n.22 (citing *United States* v. *Container Corp.*, 393 U.S. 333 (1969)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO THE UNITED STATES' SECOND OPPOSITION BRIEF

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 96-1987

Nippon Paper Industries Co., Ltd.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

REPLY TO THE UNITED STATES' SECOND OPPOSITION BRIEF

ARGUMENT

The government fails to come to grips with, let alone rebut, the serious issues raised by its unprecedented criminal application of the Sherman Act to wholly foreign conduct 107 years after the Act's passage. The government's inability to address these fundamental issues reveals the hollowness of its claim that Congress in 1890 intended the Sherman Act to subject citizens of foreign countries to criminal sanctions for business conduct undertaken entirely outside the United States. Consider a few examples of what the government ignores:

- The interpretive rules and traditions at the time the Sherman Act was passed -- the pivotal determinants of legislative intent in the absence of express statutory language. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 71 (1992). The case law and treatises at the time clearly establish that the 1890 Congress could not have intended to give extraterritorial effect to the criminal provisions of the Sherman Act for two independent reasons: (1) criminal statutes then were clearly understood not to apply extraterritorially unless Congress expressly so provided, and (2) criminal statutes were construed more narrowly than civil statutes, even if that meant giving different constructions to the same language in statutes with singular criminal and civil prohibitions. Pet. at 14-19. One can only assume that the government ignores this essential legislative context and hangs its hat on modern-day policy arguments that have no bearing on congressional intent in 1890 because it has no way to harmonize its case with these historic traditions.

- Fundamental differences between the rules governing the interpretation of criminal and civil enforcement prohibitions. For instance, while the government relies on one passage in an 1887 State Department report to argue that the extraterritorial application of criminal statutes was "firmly established" by 1890, Gov. Br. at 10, it ignores the report's acknowledgement just pages later that "[i]n the United States the territorial principle is the basis of criminal jurisprudence, and the place of the commission of an offense is generally recognized as the proper and only place for its punishment." U.S. Department of State, *Report on Extraterritorial Crime and The Cutting Case* 56 (1887). The

State Department report makes clear that whatever exceptions to this rule may have existed for criminal law, "in no case is the exception of such a character as to involve or imply an assertion by the United State (sic) of jurisdiction over the territory of another nation." *Id.* at 57.

- This Court's holdings in *United States v. Coolidge,* 14 U.S. 415 (1816) and *United States v. Hudson and Goodwin,* 11 U.S. 32 (1812), which establish that federal courts may not, as the First Circuit did, expand the reach of criminal law beyond what Congress expressly provided because doing so impermissibly creates what is tantamount to a federal criminal common law. *See* Jean Edward Smith, *John Marshall: Definer of A Nation* 284 (1996) (discussing Chief Justice Marshall's rejection of the view that, if Congress had failed to act, courts must punish the "crime" even "without the authority of statute.").

The arguments the government offers to challenge the need for immediate Court review are unpersuasive. Like its first opposition brief, the government's second submission offers nothing to question the need for immediate review by this Court to resolve the important issues raised by this Petition -- issues that implicate the vitality of this Court's precedents, future applications of the Sherman Act and other statutes with singular civil and criminal prohibitions, and strategic relations with foreign governments.

1. Like the First Circuit, the government relies on *United States v. Thompson/Center Arms Co.,* 504 U.S. 505 (1992) and *Ratzlaf v. United States,* 510 U.S. 135 (1994), to support its contention that *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), a civil case, *ipso facto*

controls interpretation of the statute in a criminal case. In so arguing, the government evinces a fundamental misunderstanding -- displayed throughout the brief -- of the distinctive standards applied to civil and criminal provisions, and the reasons underlying them. Criminal provisions, unlike their civil counterparts, are construed strictly in order to protect the rights of criminal defendants to notice and fair warning of the scope of criminal prohibitions. This is why the rule of lenity is a criminal, not a civil, rule. This is why, in the rare instances in which criminal statutes have been extended to foreign conduct, Congress has used express language that precisely identifies the circumstances to which such statutes apply.[1] The government has proffered no evidence that the boilerplate language in the Sherman Act (defining its reach as "trade or commerce . . . with foreign nations," 15 U.S.C. § 1 (1994)) satisfies this heightened standard of legislative expression.

Thompson/Center and *Raztlaf* do not help. *Thompson/Center* holds that a narrow construction must be given to the civil applications of a statute with singular civil and criminal provisions in order to protect the interpretive

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[1] *See, e.g.*, Maritime Drug Law Enforcement Act, 21 U.S.C. § 959(c) (1994) ("This section is intended to reach acts of manufacture or distribution [with intent to import] committed outside the territorial jurisdiction of the United States."); Money Laundering Control Act of 1986, 18 U.S.C. § 1956(f) (1994) ("There is extraterritorial jurisdiction over the conduct prohibited by this section if . . . in the case of a non-United States citizen, the conduct occurs in part in the United States.").

principles governing criminal statutes and to preserve the heightened protections afforded criminal defendants. The government's attempt to leverage an expansive civil interpretation of the Sherman Act into a broad criminal application of the same prohibition clearly contravenes *Thompson/Center*. And *Ratzlaf* simply holds that a single phrase used multiple times in a criminal statute should be afforded the same meaning throughout. That holding has no bearing on whether a statute with singular civil and criminal prohibitions should be construed without regard for the different interpretive standards that apply to criminal and civil provisions.

2. The government's discussion of other cases is no more compelling. Contrary to the government's assertion, *see* Gov. Br. at 7, *American Banana* clearly did involve effects in the United States arising from the export by subsidiaries of American companies of bananas from Central America into the United States. Nonetheless, the Court declined to extend the Sherman Act to conduct entirely outside of the United States because, it said, the presumption against extraterritoriality had not been overcome.

Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) and *Strassheim v. Daily,* 221 U.S. 280 (1911), also are inapplicable. *Steele*, unlike this case, involved overt acts within the United States that clearly fell within the Lanham Act's express jurisdictional reach. And *Strassheim* did not involve, as here, a pure question of statutory interpretation about whether Congress intended to export American criminal law. It simply restated the federalist principle that

a citizen of one of the United States could, under certain circumstances, be tried in another State.[2]

Unassisted by the case law, the government falls back on the unexceptionable argument that Congress has the power to make the conduct at issue subject to United States criminal law. But the power Congress wields is irrelevant. The only issue is whether Congress in 1890 *exercised* that power. The weight of the historical evidence proves that it did not.

3. The government's claim that the Restatement (Third) of Foreign Relations Law § 403 (1986) simply restates the traditional presumption against extraterritoriality ignores the express language of the Restatement itself. The presumption against extraterritoriality clearly applies in both civil and criminal cases, *see, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) but the comments to the Restatement make clear that extraterritorial application is granted "more sparingly" in criminal, rather than civil, laws "over the same activity" due to the greater impingement upon the sovereignty of foreign nations. Restatement, §

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[2] The government's only response to *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), is to claim that it "does not support construing the Act's *express* jurisdictional reach differently in civil and criminal actions." Gov. Br. at 8 (emphasis supplied). This argument cannot cabin *Gypsum*'s broad holding that civil Sherman Act precedents do not automatically govern parallel criminal proceedings. Moreover, the Sherman Act contains jurisdictional language that is no more express than the spare language bearing on the *mens rea* issue considered in *Gypsum*.

403, Reporters' Note 8. Indeed, the comments to the Restatement also distinguishes between the civil antitrust enforcement prohibitions, which may be given extraterritorial effect, and their criminal analogues, which should not be. *See id.* § 403, cmt. f.

4. The government's response to Petitioner's claim that the First Circuit's decision will impair the remedial purposes of the Sherman Act's civil enforcement machinery entirely misses the point. The government claims that Petitioner's argument is "based on the assumption . . . that courts will narrowly construe the Sherman Act's standard of conduct in civil cases to avoid creating an ambiguous standard that might later apply in criminal cases." Gov. Br. at 11. But the First Circuit's opinion would have pernicious results even where courts, in construing a case of first impression, have promulgated a clear and definite interpretation of the Act's civil provisions that has a clear and definite impact on the Act's criminal provisions, or vice versa. If the First Circuit opinion stands, then the Sherman Act (and other statutes with singular civil and criminal enforcement provisions) will have to be interpreted in the same manner, civilly and criminally. That means that either the criminal rules of strict construction will apply in civil cases, thereby preventing courts from exercising their broad authority to develop what in essence is a civil common law of antitrust,[3] or, as the government appears to assume, liberal rules of construction will be used in both civil and criminal cases,

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[3] *See* I Phillip E. Areeda & Donald F. Turner, *Antitrust Law,* ¶ 106, at 15 (1978).

thereby depriving criminal defendants of fundamental protections.

5. Petitioner's due process claim is properly before the Court. Petitioner raised the question of adequate notice before the district and appellate courts. *See* Dist. Ct. Br. at 6; App. Br. at 27-31. Indeed, Petitioner's arguments based on the rule of lenity emphasized the need for notice, predictability and fairness, which are the gravamen of procedural due process. The district court recognized as much when it held that giving the Sherman Act's criminal provisions extraterritorial effect "would present serious question about notice to foreign corporate defendants as to the criminality of its conduct." Pet. App. 48a. The court's opinion clearly preserves the issue. In any event, the case law firmly establishes that where, as here, important legal matters are raised, courts may hear the claim. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995); *United States v. Northrop Corp.*, 59 F.3d 953, 957 n.2 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2550 (1996).

On the merits, the government's attempt to question the need for Court review of Petitioner's due process claim is weak. While the government relies on *United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d Cir. 1945), a civil case, to refute Petitioner's due process claims, the government again fails to take account of the distinction between the interpretive principles governing criminal, as opposed to civil, provisions. Petitioner has marshalled a wealth of evidence to establish, *inter alia*, that at the time of the Sherman Act's passage, criminal statutes were interpreted

based on different principles of statutory construction than were civil statutes. *See* Pet. at 14-19.

The fact is that in 1990 when Petitioner was alleged to have entered into a conspiracy in Japan to fix prices on sales to other companies in Japan there was no case that provided fair notice that Petitioner could be indicted criminally under the Sherman Act.[4] The idea that Petitioner should have speculated otherwise is almost absurd when one considers the fact that four Justices of this Court in 1993 did not believe that even the *civil* provisions of the Sherman Act should be given extraterritorial effect, notwithstanding *Alcoa* and notwithstanding the fact that the conspiracy in *Hartford Fire* was crafted and supervised by United States actors. *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 814-22 (1993) (Scalia, J., joined by O'Connor, Kennedy and Thomas, JJ., dissenting).

6. The government's suggestion that because "the allegations in the indictment clearly allege co-conspirator conduct in the United States," Gov. Br. at 13, a trial will go forward in any event is mythical. After careful review of the indictment, the district court concluded that the government failed sufficiently to allege a conspiracy involving any U.S. actors. *See* Pet. App. at 42a-45a. While the court of appeals did not reach the issue, there is no

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[4] Indeed, even the Congressional Research Service did not include the Sherman Act in its list of criminal statutes with extraterritorial effect. *See* CRS Report for Congress, *Extraterritorial Application of American Criminal Law* 23-28 (September 11, 1992).

reason to believe that the district court will somehow reconsider its carefully reasoned ruling. The allegations in the indictment have not changed, and those facts "do not satisfy the government's burden of pleading with requisite particularity the existence of a vertical agreement." Pet. App. at 45a.

CONCLUSION

For the reasons stated above and in Nippon's Petition for Writ of Certiorari, the petition should be granted.

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